Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Derrick Ramon Dukes,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Deborah Ellis
Counsel of Record
700 Saint Paul Building
Six West Fifth Street
Saint Paul, MN 55102
(651) 297-6400

Counsel for Petitioner

2003 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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QUESTION PRESENTED

Whether the Minnesota Supreme Court over-extended Strickland by supplying defense counsel with a strategy and labeling it "sound" when Petitioner had rebutted the presumption of adequate representation at two evidentiary hearings where defense counsel testified that Petitioner never agreed to concede guilt and the Minnesota Supreme Court had previously agreed with Petitioner's expert that counsel's concessions of guilt in closing argument conceded guilt on all charges.

PARTIES

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OPINIONS BELOW

Mr. Dukes seeks review of the Minnesota Supreme Court's decision affirming denial of his postconviction claim of ineffective assistance of counsel following remand from that same court. The state supreme court's opinion issued May 15, 2003 is reported at Dukes v. State, 664 N.W.2d 804 (Minn. 2003)(referred to herein as Dukes III) and included at A-1 - A-34 in the appendix. The Minnesota Supreme Court's earlier opinion remanding Dukes' case for a supplemental evidentiary hearing is reported at Dukes v. State, 621 N.W.2d 246 (Minn.2001) (referred to herein as Dukes II) and included at A-36 - A-58 in the appendix. The district court's Findings of Fact, Conclusions of Law and Order Denying Relief is included in the appendix at A-59 - A-68.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The Minnesota Supreme Court denied petitioner's request for rehearing on June 16, 2003 (A-35). This Court, The Honorable Justice Thomas, granted Petitioner an extension of time up to and including October 30, 2003, by which to file a petition for writ of certiorari. See Order filed in this Court August 31, 2003. See Application No. 03A186.

CONSTITUTIONAL PROVISION

The Sixth Amendment of the federal constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner Dukes was the driver of a vehicle from which two passengers emerged and shot two victims in St. Paul, Minnesota on April 1, 1994. The first shooting occurred when Steve Morrison approached Bennie Chaney, demanded money and shot at Chaney as Chaney ran away. Chaney was unharmed. The second shooting occurred when both passengers, Steve Morrison and Kevin Lewis, shot into a parked car in which Joe McKinney was sitting. Mr. McKinney died from a gunshot wound. Duke III, 660 N.W.2d at 807 (A-3).

Dukes, Morrison and Lewis, were each charged separately in three count indictments alleging: aiding and abetting attempted aggravated robbery of Bennie Chaney (Count 1)[1] attempted murder of Bennie Chaney (Count 2)[2] and first degree felony - murder of McKinney (Count 3).[3]

Dukes at all times conceded that he drove the two passengers from Minneapolis to St. Paul. Dukes maintained that he was misled by the purpose for the excursion and acquiesced to driving his companions when one reminded him of doing Dukes a favor the previous week, i.e., giving Dukes a ride when he had no transportation.

Before Dukes' trial, Kevin Lewis entered guilty pleas to first degree attempted murder and second degree intentional murder. As part of his plea collogue, Lewis implicated Dukes and Morrison. Dukes II, 621 N.W.2d at 250.[4] Appendix at A-

1. Minn. Stat. §§ 609.245, 609.05

2. Minn. Stat. §§ 609.185(3), 609.17, 609.05

3. Minn. Stat. §§ 609.185(3), 609.05

4. The Minnesota Supreme Court's factual recitation is somewhat misleading in its statement that Lewis "confessed" and pleaded. Dukes

4. Lewis later refused to testify against Dukes and withdrew his guilty plea before Dukes' trial. A redacted portion of Lewis's withdrawn guilty plea was introduced at Dukes' trial. Dukes III, 660 N.W.2d at 808 (A-4).

In his opening statement to the jury, Dukes' trial counsel explained that two bungled robberies occurred in St. Paul on April 1, 1994. Defense counsel told the jury that the two men in Dukes' car were clearly guilty of attempted robberies and unintentional murder but that Dukes was not a party to the crimes. He concluded his opening statement by telling the jury that, "Derrick Dukes was duped." (T. 90).[5] Dukes III, 660 N.W.2d at 808 (A-5).

At trial, Dukes' counsel elicited testimony in support of the duped driver defense from two witnesses Linda Fleischman and Tomika Christmas. Ms. Fleischman, a prosecution witness, testified that Dukes was planning on giving her a ride downtown before 4:00 p.m. April 1, 1994 to make a restitution payment in a case she had in Minneapolis. (T. 442-43). Dukes did not want to give Lewis a ride to St. Paul but Lewis urged Dukes to give him a ride. (T. 445-46). Kevin Lewis gave Fleischman twenty dollars for a cab in the event that Dukes was not back in time to give her the ride she needed (T. 447).

Fleischman's testimony was corroborated by Tomika Christmas who explained that Dukes told Lewis "no" he would not take him to St. Paul because he and Fleischman had

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II, 621 N.W.2d at 250 (A-4). Lewis's only incriminating statements were made during his plea colloquy at which time he anticipated a fifty percent sentencing benefit.

5. "T.x" refers to pages in the trial transcript "P.T.1x" refers to pages in the transcript of the first postconviction hearing held February 17, 2002. "P.T. 2x" refers to pages in the second postconviction hearing held October 10, 2002

something to do but Dukes was eventually prodded into giving Lewis and Morrison a ride to return a favor to Morrison who gave Dukes a ride a week earlier. According to Ms. Christmas, Lewis told Dukes he needed to pick up something at his (Lewis') girlfriend's residence (T. 586-87).

At the close of the state's case, the prosecution sought to introduce evidence of Dukes' prior convictions under Rule 404(b), Minn.R.Evid. The trial court ruled that the other-crime evidence would be excluded but noted that the issue could be revisited if the defense changed course. See T. 526 quoted in Dukes II, 621 N.W.2d at 254 (A-49). Defense counsel replied, "It is not going to change, Your Honor." (T. 527) (A-49). The trial judge made the following observation when ruling on the other-crimes evidence:

> Well, my understanding of the defense's case at this point is that Mr. Dukes was there, he was in the car when both incidents happened, that he was not aware of what Mr. Morrison and Mr. Lewis were going to do. He did not participate. He could not have known what their intentions were.

(T. 526).

Following the trial court's ruling excluding the other-crime evidence, the state rested and defense counsel, consistent with the duped driver defense, sought judgment of acquittal on Count 1, the attempted aggravated robbery of Chaney (T. 529-31). The motion was denied.

The trial court again observed during the jury instruction conference the plausibility of Dukes' duped driver defense and the possibility Dukes could be acquitted on the first count - aiding and abetting the attempted robbery of Chaney. The trial judge noted:

> I think it is possible for the jury to conclude that Mr. Dukes might have been involved in robberies, might conclude that he was not involved in the first one. The second one he maybe did not know that what the people, you know, again, I don't know.

(T. 617) (emphasis added).

Despite ample evidence that Dukes was not a party to any plan to commit robberies in St. Paul, defense counsel, in closing argument, made several remarks conceding that the state's evidence on Count 1 was formidable against Dukes and even suggesting that Count 1 was the defense's weakest case (T. 674) (A-75). Counsel went on to argue that the jury should have doubt on Counts 2 and 3, the attempted murder and murder counts. Id.

The jury returned to court during deliberations with a question asking whether they were to judge Dukes or Dukes "and his accomplices." (T. 708). After ten hours of deliberations, the jury returned guilty verdicts on all three counts. (T. 705, 710). Petitioner was sentenced to imprisonment for life for aiding and abetting first murder and a consecutive sentence of 180 months for aiding and abetting attempted murder in the first degree, Dukes III, 660 N.W.2d at 807 (A-2).

Following Dukes' direct appeal - reported at State v. Dukes, 544 N.W.2d 13 (Minn. 1996)(referred to as Dukes I, in later opinions) - a petition for postconviction relief was filed in the state district court raising, among other issues, a claim of ineffective assistance of counsel based on concessions of guilt in closing argument.

The postconviction district court held an evidentiary hearing at which Dukes testified that he and his counsel had never discussed any strategy whereby counsel would concede aiding

and abetting the attempted aggravated robbery of Bennie Chaney. Dukes also presented expert testimony from a highly regarded criminal defense lawyer[6] that the closing argument by trial counsel fell below an objective standard of reasonableness because trial counsel's concession of guilt to Count 1, attempted aggravated robbery of Bennie Chaney, served as a concession that Dukes was party to a plan to commit robberies in St. Paul and was not a duped or unwitting driver (P.T.1 7,8-9, 33). Dukes trial counsel was not called to testify at the evidentiary hearing.

After the evidentiary hearing the postconviction court summarily denied the petition without reaching the merits of Dukes' Sixth Amendment claims, adopted verbatim the state's proposed order and found the claims procedurally defaulted. Dukes II, 621 N.W.2d at 251, 255 (A-38).

The Minnesota Supreme Court, on appeal from the summary denial of postconviction relief, affirmed denial of relief on all but two issues and remanded for a supplemental evidentiary hearing for a determination of "whether Dukes consented to his counsel's admission of Dukes' guilt to aggravated robbery," Dukes II, 621 N.W.2d at 255 (A-37). Specifically the Supreme Court directed that the lower court "need[ed] to consider testimony from Dukes and his counsel." Id. Appendix at A-50.

The Minnesota Supreme Court concurred with Dukes' expert that a concession to Count 1 essentially conceded the entire case because a person who participates in, or aids, an aggravated (armed) robbery is virtually assured of a murder conviction if someone is killed. See State v. Campbell, 281 Minn. 1, 161 N.W.2d 47, 55 (1968). The Minnesota Court

6. The Minnesota Supreme Court acknowledged the defense expert's credentials in Dukes III, 660 N.W.2d at 808, (A-6).

noted, " a concession of guilt to aggravated robbery undermines Dukes' defense that although he was present, he was unaware of the intentions of Morrison and Lewis. Dukes II, 621 N.W.2d at 253 (A-47).

At the state supreme court's direction, Dukes' trial counsel was called to testify on remand. Trial counsel testified that at all times he was intent upon seeking acquittals of all three counts in the indictment. He confirmed that he and Dukes never discussed conceding guilt and trial counsel testified he did not intend to concede Dukes' guilt. (P.T. 2, 5, 8). Dukes III, 660 N.W.2d at 809 (A-7) Defense counsel offered no strategy for making the following remarks in closing argument:

1. "Now, you think he's aiding and abetting. That's just fine. But was he aiding and abetting an intentional act of murder? Or was it aiding and abetting an unintentional act? You have a hard decision . . .." (T. 671) (A-75).

2. "[T]his is not an organized plan, this is disorganized crime. The intent is to rob" (T. 672)(A-76).

3. "They had decided after the failed robbery to go home."(T. 673) (A-76).

4. "[P]erhaps their [Dukes and Lewis'] mere presence and not leaving indicates aiding and abetting." (T. 674) (A-77)

5. [T]he evidence would allow you to infer, I agree, yes it was still a concerted action [attempted robbery of McKinney which followed attempted robbery of Chaney]." (T. 674) (A-77).

6. "Now we get to the weakest evidence in the case. It's Dukes' car . . .." "Clearly it would seem to be Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney." (T.674) (A-77).

7. "Well, you may say there was an attempted aggravated robbery. And you may say that there was an aiding and abetting." (T.674) (A-77).

8. "You may not have reasonable doubts on the issues of aiding and abetting, either two of the three or three of the three." (T. 678) (A-77).

9. "Now, Count 1. Count 1, both Lewis' plea and Lewis' explanation to McConnon put Derrick Dukes right into it right up to his hips. You know it. I know it." (T. 679) (A-80).

10. "He is in deep trouble in Count 1." (T. 679) (A-80).

11. "[T]here should be extreme doubt in your mind regarding the intent to kill of Chaney, and the intent to kill McKinney, perhaps not so much as Count 1." (T. 680) (A-80).

12. "Because it [fault] does lay at the feet of Kevin Lewis and his aiders and abetters." (T. 681) (A-80).

(The Minnesota Supreme Court in Dukes II, identified at least four of the foregoing statements by counsel as apparent concessions of guilt in its decision to remand for a hearing on whether the concessions were with Dukes' permission. See Dukes II, 621 N.W.2d at 252-53 (A-44 - A-50)).

The postconviction district court again denied Dukes relief after the supplemental evidentiary hearing. In the second order denying postconviction relief.

The postconviction court again concluded that Dukes' claims were procedurally barred.[7] See Conclusion of Law Nos.

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7. The procedural default determination was previously rejected by the Minnesota Supreme Court Dukes II, 621 N.W.2d at 254-55 (A-49 - A-50); See Dukes III, 660 N.W.2d at 821 (A-33) (dissent).

1 and 5 (A-60.) The state postconviction court made findings that defense counsel's strategy was consistent throughout trial and that counsel's statements in final argument "were not necessarily concessions of Petitioner's guilt as to any element." See Findings of Fact Nos. 8 and 9 at (A-60 - A-61) cited in Dukes III, 660 N.W.2d at 809 (A-8) In a memorandum incorporated into its Order Denying Relief the postconviction court offered possible rationales for defense counsel's statements which were alleged to be concessions:

- "If trial counsel conceded anything in his closing argument, he might have conceded the strength of the state's case."
- "Such a concession might have been calculated to enhance trial counsel's credibility in the eyes of the jury."
- "That might not have been the best tactic. . ."
- "A different attorney might have used different tactics or different words. . ."

Memorandum at (A-63)

The postconviction court made no finding and rendered no opinion on whether defense counsel's strategy was sound, concluding in a memorandum that if counsel's remarks were concessions of guilt, Dukes should have complained earlier and the jury had been instructed that counsel's arguments were not evidence (A-66 - A-68). The postconviction court never acknowledged or addressed the opinion rendered by Dukes' expert. See Findings of Fact, Conclusions of Law and Order Denying Relief at A-59.

The Minnesota Supreme Court in Dukes III, in deference to the district court, accepted the postconviction district court's determination that trial counsel's strategy was consistent

throughout and that counsel's statements were not necessarily concessions of guilt. Dukes III, 660 N.W.2d at 811 (A-12). The Minnesota Supreme Court addressed the issue of whether counsel's closing argument was objectively reasonable on its own. The majority concluded that counsel had a strategy in closing argument even though the arguments were not eloquent or effective and "counsel may have conceded more than necessary." Dukes III, 660 N.W.2d at 814 (A-19).

Two dissenting justices rejected the majority determination that counsel's closing argument was strategically sound. Justice Hanson wrote:

> [T]he words actually used by trial counsel, as recorded in the transcript of the closing argument, are not capable of being interpreted in any way other than as a concession of guilt to Count 1, the charge of attempted aggravated robbery.

660 N.W.2d at 819 (A-28).

The majority of the supreme court reviewed defense counsel's closing argument, focusing on four statements in particular which the same court in Dukes II had noted appeared to be concessions of guilt.[8] Compare Dukes II, 621 N.W.2d at 252-53 (A-35), with Dukes III, 660 N.W.2d at 813 (A-3). The Minnesota Supreme Court found counsel's concessionary statements to have been "uttered in a rhetorical context." Dukes III, 660 N.W.2d at 814 (A-20). The Minnesota Supreme Court also found that counsel's statement that "Dukes is in it right to his hips" on Count 1 did not amount to an implied concession of

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8. Petitioner has never conceded that there were only four statements that reflect concessions of guilt. Petitioner contends that the number of concessions of guilt approximate one dozen as cited infra. at page 13-14 and in the defense closing argument included at A-69.

guilt. Id. at 815 (A-15). The Supreme Court acknowledged that more emphasis was placed on seeking acquittals on Counts 2 and 3 (attempted murder and murder charges).[9] Id. at 816 (A-16). The Minnesota Supreme Court again sua sponte characterized defense counsel's remarks in closing argument that there was "perhaps not so much [reasonable doubt] on Count 1" as an "off-handed" statement. Id. at 816 (A-21).

(The postconviction district court had made no findings that trial counsel's remarks were either "asides" or "off-handed" remarks The extent of the postconviction court's "findings" regarding closing arguments are reported by the Minnesota Supreme Court in Dukes III, 660 N.W.2d at 809-10 (A-7 - A-8). See also A-58. (Findings of Fact, Conclusions of Law and Order Denying Relief.))

Dukes sought rehearing in the Minnesota Supreme Court, which request was denied by Order filed June 16, 2003 (A-35).

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9. Petitioner submits that counsel made no argument to the jury for acquittal on Count 1 a point with which the dissenting justices agreed. Dukes III, 660 N.W.2d at 819 (A-17). In his opening remarks in closing argument, defense counsel indicated that the jury would be "required to acquit Mr. Dukes of the murder charges in this case." (T. 661)(A-68). Counsel's final remark in closing was, "it was unintentional, not intentional. You've got a hard job." (T. 681) (A-79). Mid-argument, defense counsel again impliedly conceded guilt on Count 1, stating that the prosecutors wanted the jurors to be objective rather than rely on their feelings of "how can we let this guy go on this murder and attempted murder." (T. 677) (A-76 - A-77) (Counts 3 and 2 respectively). Counsel specifically asked for not guilty verdicts on the murder of McKinney (Count 3) and attempted murder of Chaney (Count 2) but no similar request for Count 1. See T. 678-79 (A-77 - A-78).

REASONS FOR GRANTING THE WRIT

Despite directives from this Court to give high deference to trial counsel's strategic decisions,[10] the Minnesota Supreme Court over-extended Strickland by supplying a strategy and then countenancing it as "sound" after two evidentiary hearings at which counsel offered no strategy or authorization for conceding guilt. The Minnesota Supreme Court has drastically departed from the accepted and usual course of judicial proceeding calling for an exercise of this Court's supervisory power in view of undue deference given to trial counsel's actions after evidentiary hearings which offered no support for the appellate court's conclusions.

This case is distinguishable from this Court's recent decision in Yarborough v. Gentry, ___ U.S. ___2003 WL 22382563 (per curiam) filed October 20, 2003, because the Minnesota Court gave undue deference to trial counsel's actions as strategic when the record at the evidentiary hearings contradicts the high deference which the state's highest court afforded counsel. See Section 3.11, ABA Standards Relating to Appellate Court (1994). ("In reviewing a determination by a trial court, an appellate court should determine whether the court . . . rested its determination on factual conclusions reasonably supported by the evidence.")

In Gentry, this Court noted that the strong presumption of adequate assistance of counsel "has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" Gentry, 2003

10. Strickland v. Washington, 466 U.S. 668, 689 (1984); accord Bell v. Cone, 535 U.S. 685, 702 (2002).

WL 22382563 at *4. (citation omitted). Indeed in Gentry, the claims of ineffective assistance of counsel due to an ineffective closing argument were raised on direct appeal. See Gentry v. Roe, 320 F.3d 891, 899 (9th Cir. 2003). Dissimilarly here, Dukes' claims were raised in a collateral proceeding[11] and were the subject of two evidentiary hearings.

Even in Strickland this Court noted that strategic choices must be respected only if based on professional judgment. 466 U.S. at 681, 689 accord Wiggins v. Smith, 539 U.S. __, 123 S. Ct. 2527 (2003). Since Stickland, many reviewing courts have considered whether counsel's strategy was "sound."[12]

The Minnesota Supreme Court, prior to Dukes III, had never passed on the question of whether defense counsel's claimed strategy was sound and fell within the bounds of objectively reasonable representation by defense counsel.[13] Hence, the Minnesota Court's decision to sua sponte provide a strategy for defense counsel's closing argument and label it "sound," after two evidentiary hearings, is beyond alarming and over-extends this Court's directive in Strickland and Cone to be

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11. See Minn. Stat. § 590.01 et. seq. (Minnesota's postconviction statue).

12. See e.g.s. Pavel v. Hollins, 261 F.3d 210, 218 (2nd Cir. 2001) (counsel's decision although "'strategic'" in some sense of the word was objectively unreasonable); United States v. Villalpando, 259 F.3d 934, 939 (8th Cir. 2001) (counsel's cross-examination of one witness had "no strategic value for the defendant" and was so "inherently unsound and unreasonable" that it undermined confidence in the outcome of the trial.) Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000) (circuit court rejected counsel's alleged strategy in failing to object to prosecutor's statement in closing argument as untenable and unconvincing).

13. Computerized research by Petitioner's counsel found no Minnesota cases addressing the issue whether a claimed strategy was sound.

deferential to defense counsel's strategy. See Strickland, 466 U.S. at 689; Bell v. Cone, 535 U.S. 685, 698 (2003).

Although demanding, the Strickland standard was not intended to be insurmountable. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Certainly this Court never intended that appellate courts, after review of the records at trial and evidentiary hearings, ignore the record and evidence presented and supply a strategy when none was offered. In Dixon v. Snyder, 266 F.3d 693 (7th Cir. 2001) the Seventh Circuit was presented with a somewhat similar situation in a proceeding brought under 28 U.S.C. § 2254. In Dixon, the federal courts rejected the Illinois Appellate Court's finding that trial counsel had a "perfectly sound trial strategy" for not cross-examining the prosecutor's key witness. Id. at 702 citing People v. Dixon, 701 N.E.2d 566 (Illinois 1966). In Dixon no evidentiary hearing was held, however, on the defendant's claims and the Seventh Circuit Court found the state appellate court's application of Strickland unreasonable. Dixon v. Snyder, 266 F.3d at 698, 703.

In Dukes' case, the Minnesota Supreme Court not only engaged in an unreasonable application of Strickland, the Minnesota Court ignored the record below, made a factual finding not supported by the record[14] and supplied its own assumptions and rationale post hoc. As such, the Minnesota Supreme Court's decision again conflicts with Strickland as explained in Wiggins v. Smith, 539 U.S. __, 2003 123 S.Ct. 2527 (2003) (designation by lower court of a "strategic decision" was a rationalization not an accurate description of counsel conduct).

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14. The Supreme Court found that defense counsel asked the jury to acquit Dukes on Count 1 which is not reflected in the record. See A-69 - A-81.

While the Minnesota Supreme Court purported to defer to the district court's ruling in Dukes' case, the opinions of the two courts are dramatically inconsistent. For instance, the district court contradicted its own finding that counsel's remarks in closing were not necessarily concessions of guilt by observing, "[S]uch a concession might have been calculated to enhance **trial counsel's credibility** . . ." Id. The Minnesota Supreme Court concurred that such a tactic might "sometimes" be valid for counsel. Dukes III, 660 N.W.2d at 817 (A-23). (But defense counsel did not offer his own credibility as an explanation for his closing argument. He gave no explanation and no strategy.) The district court engaged in conjecture as to what counsel's intent "might have" been rather than take notice of a lack of rationale. The state supreme court on the other hand characterized counsel's statements as rhetorical, off-handed and ultimately "sound". Dukes III, at 814-16 (A-18 - A-22). The record of counsel's closing argument does not support the state supreme court's characterization of rhetorical. See Dukes III, 660 N.W.2d at 819 (Hanson, S. Meyer, J.J. dissenting)(A-29).

While there are situations where defense counsel may seek to gain credibility and obtain a conviction on a lesser (or non-capital) offense, that tactic was not workable or authorized in this instance because as the prosecutor, defense counsel, expert, and state appellate court in Dukes II, all acknowledged, a concession to being party to the plan to commit the robbery of Chaney rendered liability for the resulting crimes "virtually inescapable." See T. 628-30 (prosecutor's argument regarding liability for crimes of others); defense counsel's closing argument T.670 (A-73) P.T.1- 8-9, 42-43 (expert opinion); Dukes II, 621 N.W.2d at 253 (A- 45); Dukes III, 660 N.W.2d at 820-21 (dissent) (A-32), Thus even if counsel's strategy was to bolster his credibility by conceding guilt to Count 1, i.e., his credibility,

such a strategy was ill-chosen and objectively unreasonable. See Strickland, 466 U.S. at 681.

In Strickland, this Court relied upon trial counsel's testimony from an evidentiary hearing regarding his strategic choices. 466 U.S. at 673, 678, 679. Similarly in Bell v. Cone, 535 U.S. 585 (2000), counsel's testimony regarding his decisions concerning witnesses to call and waiver of final argument were given deference by this Court. This approach has generally been followed in other courts. See e.g.s. Boyd v. Minnesota, 274 F.3d 497, 502 (8th Cir. 2001); Miller v. Francis, 269 F.3d 609, 616 (6th Cir. 2001) cert. denied 535 U.S. 1011 (2002).

In accordance with Strickland, when defense counsel offers no strategy that lack of evidence must be given deference no less than an offered strategy. The Minnesota Supreme Court exceeded the proper scope of appellate review by ignoring the record and creating a strategy.

Closing argument is the final opportunity for the advocate to present a reasonable, persuasive explanation. It is the last opportunity the advocate has to explain and ask for a specific result. See R. Haydock & J. Sonsteng, Advocacy: Opening and Closing, §3.10 p. 70 (1994) cited in Gentry, __ U.S. __ 2003 WL 22382563 at *4. Where Dukes' trial counsel never asked for an acquittal on Count 1 but conceded Dukes' guilt on Count 1, there was no logic in finding counsel's argument strategically sound. Defense counsel's closing argument was worse than no argument at all such as in Cone, infra, because in Dukes' case counsel expressed his personal opinions that he believed there was strong evidence upon which to convict Dukes of Count 1.[15]

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15. See T. 676 (A-15) "[B]oth Lewis' plea and Lewis' explanation to McConnon put Derrick Dukes right into it right up to his hips. You know it. I know it. He's in deep trouble in Count 1."

The right to effective assistance of counsel extends to closing arguments. Yarborough v. Gentry, __ U.S. __, 2003 WL 22382563 at *3 filed October 20, 2003; Bell v. Cone, 535 U.S. 685, 701-02 (2002); Herring v. New York, 422 U.S. 853, 865 (1975).

The Minnesota Supreme Court stretched too far to try and rationalize trial counsel's closing argument contrary to the trial record and the record from the evidentiary hearings. As such the Minnesota Court misapplied and over-extended Strickland. Lest closing argument be rendered beyond review and the Strickland standard insurmountable following an evidentiary hearing, this Court should accept review of the Minnesota Supreme Court's decision in this case.

CONCLUSION

Based on the foregoing a petition for writ of certiorari should be granted.

Respectfully submitted,

Deborah Ellis
Counsel of Record
700 Saint Paul Building
Six West Fifth Street
Saint Paul, MN 55102
(651) 297-6400

STATE OF MINNESOTA
IN SUPREME COURT
C9-02-491

Ramsey County

Gilbert J.
Concurring in part, dissenting in part, Hanson, J.
and Meyer, J.

Derrick Ramon Dukes, petitioner,

Appellant,

vs.

State of Minnesota,

Filed: May 15, 2003
Respondent. Office of Appellate Courts

SYLLABUS

Appellant failed to prove an actual, ineffective assistance of counsel claim based on his allegation that his trial counsel materially changed trial strategy without his consent.

Contested statements made by appellant's trial counsel during closing arguments do not amount to improper concessions of criminal guilt so as to give rise to an ineffective assistance of counsel claim.

Appellant's accomplice's affidavit, created 4 years after appellant's trial and stating merely that his earlier testimony which had been used to help convict appellant, had been "a lie," was not a sufficient round for a new trial under the *Larrison* test.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

GILBERT, Justice.

This is our third review of this case and involves our review after remand of a postconviction court's denial of a petition for relief. Our first review, *Dukes I*, was Dukes' direct appeal of his conviction for the attempted aggravated robbery and attempted first-degree felony murder of Bennie Chaney, and first-degree felony murder of Joe McKinney for which he was sentenced to consecutive sentences of life imprisonment for first-degree murder and 180 months for attempted first-degree murder. *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996 (hereinafter *Dukes I*). We affirmed the conviction. *Id.* at 15

Our second review, *Dukes II*, was Dukes' appeal of the denial of his petition for postconviction relief. *Dukes v. State*, 621 N.W.2d 246 (Minn. 2001 hereinafter Dukes II). In *Dukes II*, Dukes argued, among other claims, (1) the Postconviction court erred in dismissing as procedurally barred his claim that he had received ineffective assistance of counsel because his attorney had conceded his guilt as to the attempted aggravated robbery charge without Dukes' consent and (2) the postconviction court erred in denying him a new trial on the basis of an accomplice's recantation of plea testimony that had been used to convict Dukes. *Id.* at 252, 257. We remanded to the postconviction court on these two issues. *Id.* at 255 258. After holding an evidentiary hearing on October 10, 2001, the postconviction court made findings of fact and conclusions of law and entered an order denying relief, dated February 7, 2002. Now we are presented with *Dukes III*, the appeal of that denial. We affirm.

The facts of the underlying crimes in this case are set out in detail in *Dukes I.* 544 N.W.2d at 15-18. The essential facts are as follows. On April 1, 1994, Dukes and two accomplices, Kevin Lewis, n/k/a Hannabal Shaddai, and Steve Morrison drove in Dukes' car, from Dukes' home in Minneapolis to St. Paul. Morrison and Dukes were both armed with handguns. Bennie Chaney testified that the trio pulled up to the curb in front of him, that a man in the front passenger seat held up a gun cocked it and said something Chaney interpreted to mean hand over your money. Chaney ran behind the car and in the street. When he was about 30 yards away, he turned to see that the car was still parked at the curb. Hoping to scare them away, Chaney mimed going into his jacket for a gun at which point Morrison opened the back door, shouted something to Chaney, and fired two shots in his direction. Chaney escaped unharmed and at Dukes' trial Chaney identified Dukes as one of the men in the car.

Other witnesses then noticed the car as Dukes, Lewis, and Morrison continued driving through the neighborhood, eventually stopping across the street from a car owned by Joe McKinney. McKinney was seated in the driver's seat talking to some - neighborhood children. Morrison and Lewis got out of Dukes' car and approached McKinney's car. Morrison walked up to the driver's window, brandished a gun, and demanded money. Meanwhile Lewis had positioned himself on the other side of McKinney's car armed with Dukes' gun. When McKinney made a motion with his hand, both Morrison and Lewis fired and Lewis' shot hit McKinney in the back of the head. McKinney died early the next morning from the wound. Dukes was arrested and charged with the Attempted aggravated robbery and first-degree attempted murder of Chaney and the first-degree murder of McKinney.

Before Dukes' trial, Lewis pleaded guilty to second-degree murder and attempted first-degree murder and in his plea hearing he testified to roughly the events outlined above. As part of the plea, Lewis was to receive a reduced sentence and he agreed to testify at the trials of Dukes and Morrison. At the beginning of Dukes' trial, however, on September 13, 1994, Lewis withdrew his plea and refused to testify. The district court allowed the prosecution to read the redacted transcript of Lewis' plea hearing into the record.

During Dukes' trial, the prosecutor presented a strong case, establishing that ballistics matched the bullet that killed McKinney to Dukes' gun, that Dukes' car was used during the crimes, and that Dukes had been identified by eyewitnesses. Additionally, the prosecution relied on Lewis' plea transcript.

Defense counsel conceded some obvious facts that were bound to appear as evidence in his short opening statement.[1] He told the jury that there were "two bungled holdups that resulted in the accidental, unintentional unexpected death of Joe McKinney." He described these acts as "disorganized crime" but told the jury that the essential proof of attempt, intent, and aiding and abetting would not be proved beyond a. reasonable doubt. Counsel did concede in opening statement that there was an attempt to "rob intentionally * * * by two of the co-defendants. The evidence will not show that Derrick Dukes was aiding and abetting these people." The defense counsel further argued that though there were two crimes committed that day, they were not committed by Dukes and there was no first-degree murder.

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[1] The opening statement consisted of 4 pages in the trial transcript.

Defense counsel then stated that if Lewis and Morrison were on trial, he would urge the jury to find them guilty of attempted robbery and unintentional murder: Finally, he stated that Dukes was not an airier and abettor of these two men: "Derrick Dukes was duped."

Defense counsel also conducted cross-examination to impeach the memory and credibility of the prosecution's witnesses; criticized the use of leading questions by the prosecution in eliciting Lewis' plea; criticized the presentation of an accomplice's testimony; pointed out that the jury never heard or saw the accomplice; and questioned the reliability of the ballistics. Additionally, defense counsel called Dukes' mother, stepfather and girlfriend, who all testified that Dukes had money, and a friend of Dukes who testified that Dukes stated that he went to St. Paul believing he was helping Morrison run an errand and had no idea what his accomplices had planned.

In his closing argument, Dukes' attorney discussed the prosecution's failure to prove Dukes' intent to rob or murder either victim, and the lack of proved intent to kill by either of his accomplices. He also made four statements that Dukes now alleges amount to implied concessions of guilt: The jury convicted Dukes of all counts, and in *Dukes I* we affirmed, noting the strength of the prosecution's case against Dukes. 544 N.W.2d at 20 ("We believe the evidence of intent was strong enough that the jury could not rationally have acquitted appellant on the first-degree charge, where appellant and his accomplices planned the robbery, armed themselves with loaded handguns, proceeded to St. Paul for the express purpose of executing their plan, located two victims, and finally, in the course of their robbery spree, shot McKinney in the back of the head at close range."). No ineffective assistance of counsel claims were raised during that appeal.

Three years later, in September 1999, Dukes raised the issue of ineffective assistance of counsel for the first time in his petition for postconviction relief. He offered expert witness testimony of attorney Phillip Resnick, a well-respected member of the National Association of Criminal Defense Lawyers. Resnick testified to a number of examples of error, including his belief that counsel had conceded Dukes' guilt. Resnick stated that it was clear to him that trial counsel had switched strategies and should have stuck to the "duped driver" defense. Dukes then testified that he and his trial attorney had agreed to present the duped driver defense and go for an acquittal on all charges. Dukes also offered a handwritten affidavit dated June 24, 1998 and signed by Lewis, n/k/a Hannabal Shaddai, in which Shaddai claims that the statement he made during his plea hearing was "a lie." The district court denied Dukes' petition for postconviction relief.

In *Dukes II*, Dukes appealed the denial of postconviction relief and we affirmed the denial of most claims but remanded two issues to be heard on their merits. 621 N.W.2d at 250. The first of these remanded issues related to the assertion that Dukes' attorney had conceded his guilt as to the aggravated robbery count without his permission. *Id.* at 252. We stated that Dukes' attorney's closing statements "*could be* interpreted as conceding" guilt. *Id.* at 253 (emphasis added). We remanded this issue to the postconviction court because additional fact-finding and testimony from Dukes, his trial attorney, and other witnesses was needed. *Id.* at 255. Also remanded was Dukes' claim that the postconviction court erred in denying a new trial because of Lewis' recantation of his plea testimony. *Id.* at 257-258. We stated that the postconviction court appeared to have applied the test for newly discovered evidence instead of the test for newly discovered falsified testimony, and we

remanded for the court to apply the appropriate test to this claim. *Id.*

During the remand proceedings in the district court, Dukes' trial attorney, Richard Coleman, testified as to the first issue. Coleman stated that he and Dukes had agreed that the defense was to be that Dukes drove the car but was unaware that crimes would be committed. He testified that Dukes at no time agreed to change the defense strategy from going for not guilty verdicts on all charges, and further stated that he did not intend to concede guilt and, in fact, did not concede guilt during closing arguments. The expert defense witness again testified that, in his opinion, the closing argument was not a reasonable attempt at getting not guilty verdicts on all counts because counsel had conceded guilt. No additional testimony was given regarding the second remanded issue. The post conviction court again denied Dukes' petition for relief.

The court found as follows in its Findings of Fact, Conclusions of Law, and Order Denying Relief:

> 6. Because trial counsel did not intend to concede guilt, there is no evidence in the record that counsel discussed such a strategy or that Petitioner explicitly agreed to such a strategy.
>
> 7. Petitioner's trial counsel testified that he did not intend to make and did not make any statements that could be considered as concessions of Petitioner's guilt.
>
> 8. Counsel's strategy was consistent throughout the trial.

9. The statements in the final argument, considered in the totality of the circumstances and were not necessarily concessions of Petitioner's guilt as to any element. [sic]

10. The legal and factual bases for the claim that Petitioner was denied the effective assistance of counsel at trial because his counsel may have made concessions of guilt during final argument were known and available to Petitioner at the time of his direct appeal.

11. Petitioner has not shown why the claim should in fairness be considered in a subsequent post conviction proceeding.

The postconviction court then concluded as follows:

1. Petitioner is procedurally barred from raising the claim that his conviction was obtained by the use of false testimony at trial. The legal and factual bases necessary to raise the claim were available at the time of the direct appeal. Fairness does not require consideration of the issue.

* * * *

3. Petitioner was not denied the effective assistance of counsel at trial.

4. The result of the trial was reliable. Petitioner has not shown that he was prejudiced by counsel's final argument.

5. The legal and factual bases for the claim that Petitioner was denied the effective assistance of counsel at trial were known to Petitioner at the time of the direct appeal. The claim is procedurally barred from consideration in a post conviction proceeding.

Dukes appealed the postconviction court's denial of relief.

I.

A postconviction court's decision will not be overturned unless there has been an abuse of discretion. *Voorhees v. State*, 627 N.W.2d 642, 648 (Minn. 2001). Because a petition for postconviction relief is a collateral attack on a judgment that has a presumption of regularity, the petitioner must establish, by a fair preponderance of the evidence, facts that warrant postconviction relief. *Pederson v. State,* 649 N.W.2d 161, 163 (Minn. 2002). Accordingly, we review each of Dukes' allegations of error under an abuse of discretion standard.

Dukes presents two ineffective assistance of counsel claims: the first is that his attorney changed trial strategies by abandoning the "duped driver" defense; and the second is that his attorney made unconsented to concessions of Dukes' guilt in his closing argument. We begin by addressing the first of these claims.

Ineffective assistance of counsel claims are evaluated in accordance with the two-prong test that the Supreme Court articulated in *Strickland v. Washington,* 466 U.S. 668 (1984),

and that we adopted in *State v. Eling*, 355 N.W.2d 286, 293 (Minn. 1984) : "First, the defendant must show that counsel's performance was deficient. * * * Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

> In deciding an ineffectiveness claim the court should judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 690. We also believe judicial scrutiny of counsel's performance must be highly deferential. As the Supreme Court noted:

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

> defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy' * * *.

Id. at 689.

With that deferential standard we address Dukes' first allegation that he was denied effective assistance of counsel because his attorney changed strategies, by abandoning the "duped driver" defense, without obtaining Dukes' approval or consent. Dukes contends that he and his attorney agreed to argue that he had been "duped" into being involved in the robbery scheme, as defense counsel did in the final sentence of the opening statement. In *Dukes II*, we stated that Dukes' counsel had not used the same strategy throughout trial. 621 N.W.2d at 254. However, after evaluating the testimony of defense counsel, the postconviction court found that trial counsel's strategy was consistent throughout the trial.

We note that defense counsel did shift his rhetorical emphasis and dropped from his closing argument the use of the term "duped,"[2] which he had used in the opening statement in relation to the intent issue. His arguments were, however, consistent to the extent that in his opening statement he described Dukes as having been duped and not an aider or abettor, and in his closing argument he described Dukes as a "21-year-old kid" and "knucklehead,"[3] present when an unintentional, unexpected and unplanned death occurred. While these statements do differ and in hindsight may not

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[2] Dupe: "one that is easily deceived * * * because lacking power to discriminate: fool a puppet or tool, esp. of a powerful person or idea." *Webster's Third International Dictionary* 702 (1993).

[3] Knucklehead: "a Stupid blunderer: dumbbell." *Id.* at 1253. *Webster's, Supra*, at 1253.

represent exactly the same strategy throughout the trial, the semantic difference between being duped and "a knucklehead" is slight. The deletion from the closing statement of one word that was used in the opening statement was sound trial strategy and well within the bounds of reasonable, professional judgment and the wide range of professional, competent assistance. Furthermore, short of an implied admission of guilt, we have never held that a changed trial strategy in itself gives rise to an ineffective assistance of counsel claim and decline to do so now.

Dukes next argues that he was denied effective assistance of counsel because his trial counsel conceded his guilt during closing arguments. The district court found, in postconviction proceedings, that there was no evidence in the record that defense counsel discussed conceding guilt or that Dukes agreed to such a strategy. Dukes argues that his counsel nonetheless made statements during closing arguments that amounted to implied concessions of guilt. We must determine whether the district court abused its discretion in finding that these statements of defense counsel "were not necessarily concessions of [p]etitioner's guilt as to any elements."

As discussed above, the appropriate test for an ineffective assistance of counsel claim is the two-prong *Strickland* test: deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687. In *Dukes II*, however, we restated the rule we first announced in *State v. Wiplinger*, that prejudice is presumed when counsel concedes defendant's guilt without client consent (or acquiescence). *Dukes II*, 621 N.W.2d at 254 (citing *State v. Wiplinger*, 343 N.W.2d 858, 860 (Minn. 1984)). We will limit our inquiry here to whether there was an unconsented to concession of guilt. In all the cases where we have addressed the issue of unconsented to

concessions since our *Wiplinger* decision, we have concluded that the defendant objected to the concession, acquiesced or consented to the concession, or that there was no admission of guilt. *See State v. Provost,* 490 N.W.2d 93, 97 (Minn. 1992).

We do not condone a defense counsel's concession of guilt without client permission or acquiescence. *Wiplinger*, 343 N.W.2d at 860. We have consistently held that even implied concessions require client consent. *See, e.g.,* Dukes II, 621 N.W.2d at 254; *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991) (concluding defendant acquiesced to concessions); *State v. Moore*, 458 N.W.2d 90, 96 (Minn. 1990) (concluding defendant's immediate objection to the concessions proved lack of consent or acquiescence); *State v. Shoop*, 441 N.W.2d 475, 480 n.3 (Minn. 1989) (citing Wiplinger as an example of an error that renders a trial "fundamentally unfair"); *State v. Sanders*, 376 N.W.2d 196, 205 (Minn. 1985) (citing *Wiplinger* as example of error that warrants a new trial); *State v. Eling*, 355 N.W.2d 286, 294 (Minn. 1984) (citing *Wiplinger* for the proposition that defense counsel cannot impliedly admit defendant's guilt). Yet, while we can never condone a lawyer admitting a defendant's guilt without his consent or acquiescence, we must be cautious in defining an "implied admission" to not allow the semantics of every questioned word, statement or misstatement of counsel by inadvertence, negligence or perhaps cleverness to be an automatic ground for a new trial.

In *State v. Vick*, we alluded to what constitutes an "implied admission" when we held that there had not been an implied admission because "[n]othing in [defense counsel's] statements [during closing argument] would lead a reasonable person to conclude that Vick's attorney admitted Vick's guilt. Because Vick's attorney's comments, *viewed in context*, do not constitute a confession, a new trial is not warranted on

this basis." 632 N.W 2d 676, 688 (Minn. 2001) (emphasis added).

To reach this definition of an implied admission we compared the facts in *Vick*, in which we determined there had been no concession of guilt, to those in *Wiplinger*, in which we held that counsel had impliedly conceded defendant's guilt. *Vick*, 632 N.W.2d at 688. In *Vick*, defense counsel traced the evidence presented by the prosecution and stated during closing argument "if you assume that Mr. Vi[c]k is guilty, then the arguments of [the prosecutor] make perfect sense." *Id.* By contrast, in *Wiplinger*, where the defendant was charged with the sexual assault of a 10-year-old girl, defense counsel asked the victim questions during cross-examination attempting to elicit that defendant had not threatened her or used force on her and had, in fact, been "gentle" "[t]hroughout all of this." Wiplinger, 343 N.W.2d at 859. The defendant's attorney thereby impliedly conceded contested facts that helped prove defendant's guilt even though defendant's position had been that he had never touched the victim. *Id.* at 861. We found that the questions counsel asked, when viewed in conjunction with defendant's claim that he had never touched the victim, constituted implied concessions of guilt. *Id.*

With that in mind, as we did in *Wiplinger* and *Vick*, we examine the context of the contested statements Dukes' counsel made to determine whether they amount to implied concessions. The challenged statements of defense counsel must be reviewed in the context of the totality of the circumstances of the trial. When the individual words are taken out of the context of a 717-page trial transcript and 20-page closing statement and lifted out of the transcript to be viewed in isolation, they take on more or even a different meaning than when viewed in context.

Dukes alleges that the following statements made during closing argument amount to implied concessions of guilt: (1) "[c]learly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney"; (2) "[Lewis' plea testimony] put Derrick Dukes right into it right up to his hips. You know it. I know it. He's in deep trouble on Count 1"; (3) while there is extreme doubt as to intent on the murder charges, "perhaps not so much as Count 1"; and (4) the "fault" and "blame" for McKinney's death lie "at the feet of Kevin Lewis and his aiders and abettors." (emphasis added).

In prelude to these contested statements in defense counsel's closing argument the jury heard unrebutted evidence that it was Dukes' car that was used during the crimes Dukes' gun that was used to kill McKinney, and that Dukes had been identified by more than one eyewitness as having been in the car at the scene of the crimes. As we noted in *Dukes I*, the case presented by the prosecution was exceedingly strong and left Dukes' attorney with few credible arguments to present during closing argument.[4] The record left no question as to whether the wrongful deeds took place or who was present when these misdeeds occurred. In fact, in his opening statement, defense counsel conceded that the two men in Dukes' car were guilty of both attempted robberies and unintentional murder, but argued that the evidence would show that Dukes was duped.

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[4] "Appellant's claim of minimal involvement simply does not hold up against a record of plans being made at his home, the use of his car, his furnishing at least one of the weapons used, and his chauffeuring Lewis and Morrison as they pursued their shooting rampage. * * * [T]he evidence supporting the verdict is substantial." *Dukes I*, 544 N.W.2d at 20.

Also in the opening statement, Dukes' counsel focused specifically on Count I, attempted aggravated robbery, and attempted to distinguish Dukes' activities from those of the two codefendants. Defense counsel stated, "The evidence will show there was an attempt to rob intentionally. There was an attempt to rob Chaney, there was an attempt to rob McKinney by two of the co-defendants. The evidence will not show that Derrick Dukes was aiding and abetting these people." In defense counsel's closing statement, there was some discussion about "concerted action," but such comments are consistent with Dukes' counsel's opening statement, about the activities of the two codefendants and the lack of evidence showing that Dukes was aiding and abetting them. [5]

Defense counsel started his closing argument by reminding the jury what he had said in opening statements about the two bungled holdups and the unexpected, unintentional and unplanned death. He argued for acquittal on the murder charge. He stressed that Lewis had lied in the transcript of his plea hearing in order to obtain a favorable plea, and that he had not even testified in Dukes' case. Defense counsel further reminded the jury that there was no evidence of what Morrison, the other person charged in this crime, had said in support of the state's theory because he never testified.

In the context of these argument themes, defense counsel made the four contested statements. The first of these, "[c]learly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney,"

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[5] The dissent concedes that the "other three challenged statements might not, by themselves, constitute an implied concession, they each add to the concession made by the first challenged statement."

referred to the first victim of the attempted robbery. Dukes argues that this statement was a concession of his guilt on the robbery charge. However, this statement was made following defense counsel's review of the prosecutor's case. Dukes' attorney used a three-step closing argument strategy: (1) he reviewed the arguments of the opposing party, (2) he admitted that if those arguments are to be believed, his client should probably lose, and (3) he then explained why those arguments should not be believed.[6] Dukes essentially argues that

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[6] The dissent suggests that this three-step process was not followed because "I do not find any point in the closing argument where Dukes' trial counsel attempts to refute the state's argument that Dukes was aiding and abetting an attempted aggravated robbery of Bennie Chaney." We direct the dissent to the following passage. After discussing the evidence the state presented against Dukes on Count 1, attempted aggravated robbery, defense counsel goes on to address the weaknesses in that evidence:

> But you have some troubling things in there, perhaps not as troubling as the intent to kill and the other two counts. But it really goes to the heart of the aiding and abetting.
>
> And I can just point out some things on that, perhaps not as persuasive as I might wish. You have the opportunity of people to put a gun in Mr. Dukes' coat down at the bar because they know he's being taken out. And supposedly one or both of the aider and abettors were there. No other jackets are found in this storage room, although is used as a cloak room by all the bouncers at the bar. You have the fact that Lewis told Tomika, Derrick didn't have anything to do with this. And you have the fact that Linda Fleischman said

> Derrick came home and said, "We got to go to the police." Or, "I want to go to the police."

In this passage, defense counsel criticizes the very evidence he earlier suggested that, if believed, made it appear that Dukes was aiding and abetting the aggravated robbery. Additionally, contrary to what the dissent argues, in referencing the six verdict forms, defense counsel argued for not guilty verdicts on all counts by saying that "Mr. Dukes is not innocent, but they also indicate that he's not guilty."

the second step of this strategy amounts to an implied concession. These arguments may not be the most eloquent or effective way to deal with obvious, inculpatory and largely unrebutted facts of two attempted aggravated robberies and shootings, and Dukes' counsel may have conceded more than necessary. However, they were uttered in a rhetorical context in response to the prosecution's evidence that defense counsel had just reviewed.

Furthermore, the closing argument started and ended with strong denials of Dukes being in on the planned robberies. Defense counsel commented that the facts were complicated, discussed arguments between Dukes and Morrison, one of the alleged coconspirators, reviewed the testimony about there having been a break in the action before rejoining or continuing the robbery, and made statements about Dukes not being in on the concerted action. Counsel also attacked the memory and credibility of Bennie Chaney to try to nullify the importance of his compelling testimony. He further argued that while Dukes may not be innocent, he was not guilty of the charged crimes. Considerable discretion must be granted to defense counsel under such circumstances and great caution must be exercised by our postconviction and appellate courts in retroactively evaluating these statements and their impact.

We hold that in light of the totality of the evidence before the jury, the postconviction court did not abuse its discretion in finding this first statement that "[c]learly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney" was not necessarily a concession of guilt.

The second alleged concession was made after a discussion of the lack of credibility of the recanted testimony

of Dukes' accomplice, and it too is acceptable strategic defense rhetoric. Counsel noted that the accomplice testimony attempted to shift the blame to Dukes on Count I, attempted aggravated robbery, by stating that if that testimony is to be believed, "Dukes is in it right to his hips." However, counsel argued repeatedly that the accomplice testimony brought in through Lewis' plea transcript was not credible. We hold that such a strategy does not amount to an implied concession of guilt and affirm the postconviction court.

The third alleged concession was part of a comparative analysis of the strength of the evidence the prosecution presented on the robbery versus the murder charges. Defense counsel recited the evidence that had been presented to counter the prosecutor's evidence on the aiding and abetting charges and concluded with the following: "Perhaps not as persuasive, and I wouldn't want to insult your intelligence on that issue, but there should be extreme doubt in your mind regarding the intent to kill of Chaney, and the intent to kill McKinney, perhaps not so much as Count 1 [the attempted aggravated robbery charge]." In *Dukes II*, we expressed concern about the impact on the attempted murder and murder charges of possible concessions to the aggravated robbery charge. 621 N.W.2d at 253-54. We further noted that counsel only argued that the jury should find the murder and attempted murder were unintentional, while failing to make such a statement about the robbery charge. *Id.* at 254. Upon remand, the postconviction court found there was no evidence in the record that counsel either discussed such a strategy or that petitioner explicitly agreed to such a strategy. That finding is not challenged in this appeal. However, the postconviction court also noted that Dukes' counsel testified he did not intend to concede guilt nor should his statements be considered as concessions of Dukes' guilt. The court further found that these statements "considered in the totality

of the circumstances * * * were not necessarily concessions of [p]etitioner's guilt as to any element." The postconviction court then concluded as a matter of law that Dukes was not denied effective assistance of counsel at trial.

Defense counsel's contested comments may have been more appropriate had the district court granted his request for a lesser-included offense.[7] Absent the lesser-included offense, this argument at best amounts to a poor comparison of the evidentiary strength on each count and, again, may have conceded more than necessary. However, our review indicates while counsel did argue that Dukes was not guilty on all three counts, there appears to have been more emphasis on arguments for acquittal on the murder and attempted murder charges than on the lesser charge of aggravated robbery. Counsel's argument that there should be "extreme doubt" on the intent to kill highlighted the importance of the more serious charges by using the words extreme doubt when only proof beyond a reasonable doubt was required to return a not guilty verdict. The off-handed statement, "perhaps not so much on Count I," is still in reference to the higher "extreme doubt" standard, which is more than is legally required, and is

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[7] During Dukes' trial after both parties rested, defense counsel attempted, with Dukes' vociferous urging, to get jury instructions for the lesser-included charge of second-degree unintentional murder while attempting to commit a felony offense. See Minn. Stat. § 609.19, subd. 2(1) (2002). This would have allowed him to argue that even if Dukes knew about and was complicit in either of the two robbery attempts, the murder and attempted murder were unintentional so Dukes should be acquitted of the first-degree murder charges. In *Dukes I*, we affirmed the district court judge's refusal to give that instruction. 544 N.W.2d at 20.

a rhetorical comparison between Counts I, II and III and mentioned in passing.

Our scrutiny of such a statement must be highly deferential in light of the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Dukes, in this case, has not overcome the presumption that under the circumstances the challenged action, while perhaps not the best trial strategy, still "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. We hold that this statement was not an implied concession of guilt nor was the argument outside the wide range of professional, competent assistance.

Finally, within 50 words of the end of his argument, defense counsel made the last contested statement in reference to McKinney's death: "[the fault and the blame] do[] lie at the feet of Kevin Lewis and his aiders and abettors." In that no party or witness alleged that there were more than three men in the car, the only people who could fall under the heading of "Kevin Lewis' aiders and abettors" are Morrison and Dukes. Dukes argues, therefore, that this statement amounts to a concession of guilt on the murder charge.

The court instructed the jury on five elements requiring proof beyond a reasonable doubt to find Dukes guilty of first-degree murder: (1) there was a death; (2) the time and the place that the death occurred; (3) the actions of the defendant and/or his accomplices caused the death; (4) the act occurred while they were attempting to or carrying out an attempted aggravated robbery; and (5) the defendant and/or accomplices acted with the intent and purpose to kill or believed that their actions would have that result. The court instructed the jury that if any of these elements had not been proved, Dukes was not guilty of murder in the first degree.

Defense counsel conceded the first three of these elements with Dukes' consent. Conceding these elements was not only a reasonable defense strategy to which Dukes consented, but the concessions were to undisputed evidence and were so obvious that to somehow attempt to deny them would remove all credibility of any rational defense argument.

Dukes asserts that by stating "[the fault and blame] do[ ] lie at the feet of Kevin Lewis and his aiders and abettors," his defense counsel conceded the fifth element, that Dukes and his accomplices acted with the intent to kill Joe McKinney. However, defense counsel vigorously argued unintentional act of killing throughout the trial. This effort occurred repeatedly in the opening statement, in the cross-examination of witnesses and in the closing statement. The words "fault and blame" arose in the overall context of defense counsel's attempt to address the death of Joe McKinney. In doing so he conceded that there was fault and blame that was attributable to Lewis and his aiders and abettors, but again emphasized and reiterated that "it was unintentional, not intentional." These words may not have exemplified the best advocacy tactic available to defense counsel, but they were consistent with his argument that Dukes, though not innocent, was not guilty of the crimes with which he had been charged. In so arguing, defense counsel was attempting to draw a fine line on the nature of the wrongdoing between criminal responsibility and civil responsibility. Defense attorneys faced with difficult cases commonly argue that there is a difference between moral blameworthiness and criminal culpability.

The words fault and blame do connote some wrongdoing, but these words do not necessarily amount to concessions of criminal guilt. A defense attorney may sometimes be wise to bolster his credibility by admitting that a defendant has done an action while denying the crime with which the action deals. Criminal wrongdoing involves more than merely the objective circumstances that were presented to the jury and encompasses the requisite intent component. Instead, "fault and blame" may imply neglect, imperfection in character, failure to do what is right, moral transgressions and wrongdoing of an excusable kind .[8] Defense counsel's use of these words was therefore consistent with the instruction that provided "The defendant is not guilty of knowing participation in a crime if his participation was inadvertent, accidental or negligent."

Also consistent with this instruction was defense counsel's repeated statements that the death was unexpected, unintentional and unplanned so as to require an acquittal by the jury on the murder charges. Defense counsel even cited portions of Lewis' testimony contained in Lewis' plea transcript that when he shot, he was only trying to scare McKinney. Defense counsel followed up by saying it was not reasonable foreseeable that someone would get shot intentionally. He brought this argument to a close by arguing that if there was aiding and abetting, it was of an unintentional act and, though there might be corroborating evidence supporting both an inference of intent and of lack of intent, both inferences are reasonable so the jury must acquit Dukes of the murder charges. Defense counsel emphasized that the jury should have "extreme doubt" in regard to the

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[8] *Webster's Third International Dictionary* 229; 829 (1993) (defining blame and fault).

intent to kill. Accordingly, we conclude that the use of these two words-fault and blame-in the context in which they were made and in light of all of the other arguments relating lack of intent, do not amount to an improper concession of criminal guilt so as to give rise to an ineffective assistance of counsel claim. In this trial, to hold otherwise would serve to render meaningless the law as instructed and the well-established facts presented throughout the trial. The ultimate purpose of such representation is that the adversarial process function properly to ensure a fair trial and just result. Eling, 355 N.W.2d at 293. That was accomplished here. We affirm the postconviction court on the grounds stated herein.

II.

We next address the issue of whether Dukes is entitled to a new trial as a result of Lewis' recantation of his plea hearing testimony, which had been used to help convict Dukes. In *Dukes II*, we remanded to the postconviction court to apply the three-prong *Larrison* test for newly discovered falsified testimony. 621 N.W.2d at 257-58. On remand, the postconviction court applied the *Larrison* test to Lewis' recantation of his plea testimony and determined that Dukes was not entitled to a new trial. As discussed in reference to the first issue, we review the findings of a postconviction court under an abuse of discretion standard. *Voorhees*, 627 N.W.2d at 648.

We adopted the Seventh Circuit's *Larrison* test in *Sutherlin v. State*: "Under the *Larrison* rule, the petitioner must meet three criteria: (1) the court must be 'reasonably well satisfied' that the testimony was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise at trial or did not know of the falsity until after trial." 574

N.W.2d 428, 433 (Minn. 1998) (citing *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). We stated in *Ferguson v. State,* however, that "*Larrison's* third prong should not be an absolute condition precedent to granting a new trial." 645 N.W.2d 437, 445 (Minn. 2002). Instead, the appropriate focus of the test is on the first and second prongs: the validity of the recantation and its potential effect on the outcome of the trial. *Id.* The postconviction court here found (1) at trial, this court ruled there were sufficient guarantees of trustworthiness to admit the plea transcript, and an affidavit 4 years later stating it was "a lie" was not enough to satisfy the postconviction court that the plea testimony was false; (2) there was sufficient evidence to convict Dukes even without the testimony because he had been identified pretrial and in court, it was his car and his mother said he was the only one allowed to drive his car, he had the motive of getting money for his girlfriend, the murder weapon was in his coat, and he was caught lying to police during the investigation, and (3) if the information in Lewis' plea transcript had been "a lie," Dukes would have known that at the time of trial and cannot now claim to be surprised by Lewis' recantation. Accordingly, the postconviction court found that Dukes failed to pass the *Larrison* test.

We are satisfied that the postconviction court did not inappropriately rely on the third prong of the *Larrison* test, and we cannot conclude that the postconviction court abused its discretion in determining that the *Larrison* test was not met. If an accomplice's affidavit 4 years after trial stating nothing more specific than that his earlier testimony had been "a lie" was a sufficient ground for a new trial, then the *Larrison* test for determining when allegedly false testimony should result in a new trial would be unnecessary because any allegation that prior testimony was false would entitle an

appellant to a new trial. We do not believe the rule should be read so broadly.

Accordingly, we affirm.

CONCURRENCE / DISSENT

HANSON, Justice (concurring in part, dissenting in part).

While I concur in the decision that the postconviction court did not abuse its discretion in determining that Lewis' recantation of his plea-hearing testimony did not warrant a new trial, I respectfully dissent with respect to the decision that the postconviction court did not abuse its discretion in denying Dukes' ineffective assistance of counsel claim. More specifically, I disagree with the majority's determination that the district court did not abuse its discretion in finding that statements made by Dukes' trial counsel during closing argument "were not necessarily concessions of petitioner's guilt as to any element."

I.

I agree that the case presented by the prosecution was strong and that Dukes' trial counsel was left with few credible arguments to present during closing. But, viewing the closing argument as a whole, I have difficulty determining exactly what argument Dukes' trial counsel intended to make. The argument does not focus on any coherent defense. In this context, trial counsel's statements emphasizing the strength of the evidence against Dukes take on greater than normal significance. While recognizing that the postconviction court was also the trial court, and had the advantage of hearing the argument first hand, I would conclude that the words actually used by trial counsel, as recorded in the transcript of the closing argument, are not capable of being interpreted in any way other than as a concession of guilt to Count I, the charge of attempted aggravated robbery.

It is true, as the majority observes, that Dukes' trial counsel sometimes used a three-step process in argument, (1) repeating the argument of the state, (2) conceding the conclusion that must be drawn if the state's argument were correct and (3) explaining why the state's argument was not correct. But Dukes' trial attorney did not use that three-step process in discussing Dukes' guilt for attempted aggravated robbery under Count I.

This is most clear in connection with the first contested statement that "[c]learly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney." Standing alone, one might posit that this statement was a rhetorical recitation of the state's argument, which trial counsel did not accept and would refute. But when this statement is viewed in context, there is no suggestion that the statement was rhetorical or that counsel did not accept it. More importantly, trial counsel never did refute it.

> The statement was made in the midst of this argument: Now we get to the weakest evidence in the case. It's Dukes' car, with two guys who pull up to a guy, and one of the men in the car say, "Give me your money" or try to rob him, Bennie Chaney. *Clearly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney.* Can you make the leap to him aiding and abetting an attempted intentional killing of Bennie Chaney during an attempted aggravated robbery? This gets complicated. Well, you may say there was an attempted aggravated robbery. And you may say that there was an aiding and abetting. But what evidence do you have that Steve Morrison intended to kill him?

(Emphasis added.)

I do not find any point in the closing argument where Dukes' trial counsel attempts to refute the state's argument that Dukes was aiding and abetting an attempted aggravated robbery of Bennie Chaney. Trial counsel later argued that there was evidence that Dukes was not aiding and abetting in the second attempted robbery, of Joe McKinney. In that connection, trial counsel emphasized that there was a disagreement between Dukes and Morrison after the attempted robbery of Bennie Chaney that could be interpreted as terminating Dukes' participation in the robbery plan. But the premise of that argument is that Dukes did participate in the plan to rob Bennie Chaney. In fact, trial counsel begins that argument by saying: "They had decided *after the failed robbery* to go home." (Emphasis added.) He concludes that argument by saying: "Now, the evidence would allow you to infer, I agree, yes, it was *still a concerted action* [to proceed with the second attempted robbery], but there is less evidence than on the intent to show that perhaps Dukes was not [rejoining the attempted robbery of McKinney]." (Emphasis added.) The reference to "still a concerted action" with regard to McKinney assumes that there was concerted action with regard to Chaney.

Although the other three challenged statements might not, by themselves, constitute an implied concession, they each add to the concession made by the first challenged statement. Thus, not only did Dukes' trial counsel fail to refute the first challenged statement that "[c]learly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney," he actually reinforced that concession by the second challenged statement that:

> Count 1 [attempted aggravated robbery], both Lewis' plea and Lewis' explanation to McConnon[1] put Derrick Dukes right into it right up to his hips. You know it. I know it. He's in deep trouble in Count 1.

Further reinforcement was provided by the third challenged statement "but there should be extreme doubt in your mind regarding the intent to kill Chaney, and the intent to kill McKinney, perhaps not so much as Count 1."

In this context, I cannot view the first challenged statement of Dukes' trial counsel as a rhetorical statement, but must conclude that it was an affirmative concession that was never qualified and never refuted. Accordingly, the postconviction court's finding that the statements "were not necessarily concessions of [p]etitioner's guilt as to any element" was an abuse of discretion.

This concession of guilt was a violation of Dukes' right to assistance of counsel in several ways. First, it was a direct concession of guilt to Count I, attempted aggravated robbery. There is no evidence that Dukes' consented to or acquiesced in the concession of guilt to Count I.

Second, a concession of guilt to attempted aggravated robbery also acts as a concession of guilt to an important element of the attempted murder and murder charges contained in Counts II and III. As we noted in *Dukes II*, "a concession of guilt to aggravated robbery essentially concedes most of the elements necessary to convict Dukes of the murder and attempted murder charges." 621 N.W.2d 246,

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[1] Kevin McConnon testified that Lewis gave him an explanation of the day of the attempted robberies that contradicted Lewis' plea testimony.

253 (Minn. 2001). It is technically true that there was one remaining element to be proven for each of those crimes that someone, Lewis or Morrison, had the requisite "intent to effect the death of the person or another." Minn. Stat. § 609.185(a)(3) (2002). But we noted in *Dukes II* that the element of intent "was proven by Lewis' admission in his plea testimony." *Id.*

Moreover, we have often recognized, in the felony murder context, that a jury can infer the intent to effect death from the mere fact that a defendant took a gun to a robbery. Thus, in *State v. Campbell*, 281 Minn. 1,13,161 N.W.2d 47, 55 (1968), we said:

> Where, as here, defendant prepared himself for the robbery by taking a gun which he has first examined to make certain that it contains live ammunition, thus prepared to shoot anyone who obstructs the robbery or his escape, the inference of premeditation and intent to shoot and kill is not only permissible, but virtually inescapable.

In fact Dukes' trial counsel underscored this problem with the intent element of the attempted murder and murder charges in closing argument when he stated:

> Now, it is true, it is true under liability for crimes of another that if the crime is reasonably foreseeable that takes place during the intended crime, and in this case the intended crime being robbery, then you're guilty of that, too. And it is reasonably foreseeable to think if you bring a gun to a hold-up and someone gets shot and dies, that you are likewise responsible for it.

Based upon the postconviction court's finding that Dukes' trial counsel did not discuss with Dukes the strategy of conceding guilt to any element and did not obtain Dukes' explicit agreement to such a strategy, this concession requires a new trial. In the absence of any finding by the postconviction court that Dukes consented to or somehow acquiesced in trial counsel's concession of guilt, prejudice is presumed and a harmless error analysis is not appropriate. *Dukes II*, 621 N.W.2d at 254; *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn.1984).

II.

The postconviction court also concluded that Dukes was procedurally barred from raising his claim of ineffective assistance of counsel in a postconviction proceeding because the legal and factual bases for that claim were known to Dukes at the time of his direct appeal. This conclusion is directly contrary to our holding in *Dukes II* that these claims fell within an exception to the general rule that claims raised or known at the time of direct appeal will not be considered on a petition for postconviction relief. 621 N.W.2d at 254-55. There, we recognized that the procedural bar does not apply to claims that require the court to hear testimony concerning the communications between the defendant and trial counsel. We said that "[t]he claim of whether Dukes consented to his counsel's admission of Dukes' guilt to aggravated robbery is exactly the type of claim that needs additional fact-finding before it can be resolved." *Id.* at 255.

It might be the better practice, in future cases, to require that a defendant, who wishes to pursue a claim of ineffective assistance of trial counsel that cannot be determined on the trial record, first move to stay the direct

appeal to permit postconviction proceedings or be deemed to have waived the claim. But we did not require that procedure in *Dukes II* and our determination that Dukes was not precluded from raising the claim of ineffective assistance of counsel in a postconviction petition stands as the law of the case.

Because Dukes' trial counsel conceded Dukes' guilt of attempted aggravated robbery, Dukes did not consent to or acquiesce in that concession, and Dukes was not precluded from seeking review of the issue in postconviction proceedings, I would reverse the district court and order a new trial.

MEYER, Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Sam Hanson.

STATE OF MINNESOTA

IN SUPREME COURT

C9-02-491

Derrick Ramon Dukes, petitioner,

Appellant,

vs.

State of Minnesota,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Derrick Ramon Dukes for rehearing filed in the above-entitled matter be, and the same is, denied.

Dated: June 16, 2003

BY THE COURT:

s/_____

James H. Gilbert
Associate Justice

STATE OF MINNESOTA
IN SUPREME COURT
C7-00-808

Ramsey County Anderson, Paul H., J.

Derrick Ramon Dukes, petitioner,

Appellant,

vs.

State of Minnesota,

Respondent.

Filed: February 1, 2001
Office of Appellate Courts

SYLLABUS

Petitioner's claims objecting to the admission of an accomplice's plea as a statement of an accomplice and the accomplice's plea testimony are procedurally barred from consideration on petition for postconviction relief because the claims were either raised in petitioner's direct appeal or were known at the time of the direct appeal, but not raised.

Petitioner's claim that his trial counsel admitted guilt to aggravated robbery without petitioner's consent and thereby provided ineffective assistance of counsel is properly raised in petition for postconviction relief because adjudication of this claim requires the postconviction court to consider petitioner's and trial counsel's testimony, together with the trial record.

Petitioner is procedurally barred from raising in a petition for postconviction relief the claim that his trial counsel was ineffective in dealing with accomplice plea testimony because this claim was known, but not raised, on direct appeal.

Petitioner's claim that his appellate counsel was ineffective because she did not cite and discuss controlling case law fails when petitioner is unable to show that he was prejudiced when on his direct appeal this court considered the controlling case law.

When a petitioner's ineffective assistance of trial counsel claim is heard on the merits in a postconviction proceeding, petitioner cannot show he was prejudiced because appellate counsel failed to advise him of the claim on direct appeal.

Regardless of whether petitioner's appellate counsel's representation fell below an objective standard of reasonableness for her failure to advise petitioner of other potential ineffective assistance of trial counsel claims, petitioner is not prejudiced when he is unable to show that there was a reasonable probability that the outcome of his direct appeal would have been different absent any error by counsel.

Petitioner's claim that he was denied equal protection and due process when he was given consecutive sentences even though his arguably more culpable accomplice was given concurrent sentences for the same crimes is procedurally barred because the claim was known, but not raised, in petitioner's direct appeal.

When considering a petition to grant a new trial due to newly-discovered falsified trial evidence, a court must analyze the effect that the absence of the false testimony would have had on the result in the original trial by applying the following three-prong test: (1) the court must be reasonably well-satisfied that the trial testimony was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise at trial or did not know of the falsity until after trial.

When a district court adopts verbatim the prevailing party's proposed findings, we will heed how the findings were prepared as we conduct a careful and searching review, but if the findings are not clearly erroneous, the verbatim adoption, standing alone, is not sufficient grounds for reversal.

Affirmed in part and remanded in part.

Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, Paul H., Justice.

In 1994, Derrick Dukes was convicted of first-degree murder, first-degree attempted murder, and attempted aggravated robbery and sentenced to life in prison plus 180 months. Dukes appealed and we affirmed his conviction. Dukes subsequently filed a petition for postconviction relief alleging denial of his Sixth Amendment Confrontation Clause rights, erroneous admission of an accomplice's guilty plea, erroneous evidentiary rulings, ineffective assistance of trial and appellate counsel, improper sentencing, and discovery of falsified evidence. The postconviction court denied relief, finding that some claims were procedurally barred because they either were raised and decided or should have been raised on direct appeal and that Dukes' other claims lacked merit. We affirm the postconviction court on all but two claims; however, we remand Dukes' ineffective assistance of trial counsel claim and his newly discovered falsified evidence claim for further proceedings.

A detailed statement of the facts can be found in *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996); therefore, we will set out only the facts relevant to this appeal. On the afternoon of

April 1, 1994, Derrick Dukes, Steve Morrison, and Kevin Lewis drove to Saint Paul in Dukes' car. Dukes was driving the car. In two separate incidents, Morrison and Lewis attempted to rob Bennie Chaney and Joe McKinney. During the attempted robberies, Morrison fired a gun at Chaney, who was not injured, and Morrison and Lewis each fired a gun at McKinney, who was killed by a gunshot wound to the back of his head. Dukes claims that he was unaware of the criminal intentions of Morrison and Lewis.

Eyewitnesses reported Dukes' license plate number to the police and the police tracked him to Gatsby's bar in Saint Paul, where he, Morrison, and Lewis worked as bouncers. The police arrested Dukes and impounded his car. Later that evening, the manager of Gatsby's notified the police that Dukes' jacket was still at the bar. The police then returned to Gatsby's to retrieve the jacket and in the pocket they found a .32 caliber pistol, which was later determined to be the gun used to kill McKinney. There is some evidence that Morrison and Lewis were present at Gatsby's when Dukes was arrested, but Morrison and Lewis were not arrested at that time. Dukes asserts that this sequence of events gave either Morrison or Lewis or both the opportunity to place the gun in his jacket.

Lewis confessed to his involvement in the crimes and pleaded guilty to first-degree attempted murder and second-degree intentional murder. The first-degree murder and aggravated robbery charges against Lewis were then dropped in exchange for his testimony against Dukes and Morrison. At his plea hearing, Lewis implicated both Dukes and Morrison in the murder, attempted murder, and robbery.

Dukes and Morrison were indicted on charges of murder in the first degree, attempted murder in the first degree, and attempted aggravated robbery in violation of Minn. Stat. §§

609.185(3) (1994), 609.17 (2000), 609.245 (2000), 609.11 (1994), and 609.05 (2000). At the beginning of Dukes' trial, Lewis withdrew his guilty plea and refused to testify.

A redacted version of Lewis' plea testimony was then admitted against Dukes. The jury found Dukes guilty of all charges and he was sentenced to a life term for first-degree murder plus 180 months for first-degree attempted murder, to be served consecutively. The court did not sentence Dukes for aggravated robbery because the robbery arose out of the same behavioral incident as the attempted murder. Lewis also was convicted of the same offenses, but was sentenced to life without parole for first-degree murder to be served concurrently with 230 months for attempted murder. Morrison was subsequently acquitted of all charges. At Morrison's trial, the court denied the admission of much of Lewis' plea testimony.

On his direct appeal, Dukes challenged four of the district court's rulings: the admission of Lewis' withdrawn guilty plea testimony; the refusal to instruct the jury on the lesser-included offense of second-degree murder; the refusal to sever the offenses into two trials; and the imposition of consecutive, rather than concurrent, sentences. Dukes, 544 N.W.2d at 15. We affirmed Dukes' convictions in aunanimous opinion. Id.

Dukes subsequently filed a petition for postconviction relief. In his petition, Dukes raised six arguments: (1) denial of Sixth Amendment Confrontation Clause rights by the admission of Lewis' plea testimony; (2) denial of his right to a fair trial by the admission of Lewis' guilty plea; (3) denial of equal protection when the same court made inconsistent evidentiary determinations on the admissibility of Lewis' testimony in Dukes' and Morrison's trials; (4) denial of effective assistance

of trial and appellate counsel; (5) denial of equal protection and due process because the district court sentenced Lewis and Dukes differently for the same crimes; and (6) that he was entitled to a new trial due to the recent discovery of falsified trial evidence.

The postconviction court held an evidentiary hearing at which Dukes and an expert testified about Dukes' ineffective assistance of counsel claims. Dukes testified that he did not give his consent to his counsel to admit guilt to any of the charged offenses, but neither Dukes nor the state elicited the testimony of Dukes' trial counsel. After the evidentiary hearing, the postconviction court denied Dukes' petition and he appealed. On appeal, Dukes raises essentially the same arguments, together with a claim that the postconviction court abdicated its duties by adopting verbatim the state's proposed findings and order.

I.

We review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record. *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997). We afford great deference to a district court's findings of fact and will not reverse the findings unless they are clearly erroneous. *State v. Bradford*, 618 N.W.2d 782, 794 (Minn. 2000). The decisions of a postconviction court will not be disturbed unless the court abused its discretion. *Perry v. State*, 595 N.W.2d 197, 200 (Minn. 1999). Each of Dukes' claims of error in the postconviction court's findings must be reviewed under this standard.

Dukes argues that the admission of Lewis' plea testimony violated his Sixth Amendment right of confrontation and that the admission of Lewis' guilty plea as the statement of an

accomplice required a limiting instruction. The postconviction court held that these two claims were raised on direct appeal, so Dukes was not entitled to a second review. Once a party takes a direct appeal, any claim raised in that appeal will not be considered in a petition for postconviction relief. *State v. Knaffla*, 243 N.W.2d 737, 741(Minn. 1976). Not only are claims previously raised barred from consideration, but consideration of claims known, but not raised, at the time of the direct appeal is also barred. *See id.* The exceptions to this rule are (1) a claim that is so novel that the legal basis was not available on direct appeal or (2) a claim that the petitioner did not "deliberately and inexcusably" fail to raise on direct appeal when fairness requires its consideration. *Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995). In Dukes' direct appeal, he raised the issue of whether the court improperly admitted Lewis' plea testimony. We affirmed the use of Lewis' plea testimony. *State v. Dukes*, 544 N. W.2d 13,19 (Minn. 1996) (distinguished by *State v. Profit*, 591 N.W.2d 451(Minn.1999), *cert. denied*, 528 U.S. 862 (1999)).

We specifically stated that the Lewis plea testimony "contained sufficient indicia of reliability to avoid violating the Confrontation Clause." *Id.* Therefore, we conclude the postconviction court did not abuse its discretion in finding that this claim was procedurally barred.

The claim of the admission of Lewis' plea as the statement of an accomplice is slightly different. Dukes relies on *State v Cermak* for the proposition that evidence of a guilty plea of an accomplice may not be used as substantive evidence against the defendant and that, at a minimum, a limiting instruction should have been given to the jury. 365 N.W.2d 243, 247 (Minn. 1985). We did not consider on direct appeal the use of Lewis' plea as the statement of an accomplice

because Dukes did not raise this claim at that time. However, the legal basis for this claim was available at the time of Dukes' direct appeal and he has not provided any theory as to why fairness now dictates its consideration. Therefore, Dukes waived consideration of the use of Lewis' plea as the statement of an accomplice. *Knaffla*, 243 N.W.2d at 741.

Likewise, if Dukes wanted to challenge the lack of a jury instruction, he should have raised this claim on direct appeal. *Roby*, 531 N.W.2d at 484. Here, Dukes has provided no reason why we should take exception to the general rule barring postconviction review. The record reflects that Dukes knew at the time of his direct appeal that Lewis' plea was introduced against him and that no jury instruction was given. We conclude Dukes has waived consideration of the lack of a jury instruction because this claim was known, but not raised, on his direct appeal. Accordingly, we hold that the postconviction court did not abuse its discretion when it found these claims procedurally barred.

II.

Dukes next asserts that his Sixth Amendment rights were violated because his trial and appellate counsel were ineffective. The Sixth Amendment guarantees the right to assistance of counsel in order to ensure that a criminal defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The Sixth Amendment has been interpreted to guarantee the criminal defendant "effective" assistance of counsel. Id. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.4 (1970)).

In order for an ineffective assistance claim to warrant a reversal of a conviction, the defendant must meet a two-pronged test evaluating deficiency and prejudice. *Strickland*, 466 U.S. at 687; *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). First, the defendant must show by a preponderance of the evidence that his counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. We have further explained this standard, concluding that "[i]n Minnesota, an attorney acts within the objective standard of reasonableness when he provides his client with 'the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances.'" *Doppler*, 590 N.W.2d at 633. There is a strong presumption that an attorney acted competently. *Strickland*, 466 U.S. at 689. Under the second prong, the defendant must show by a preponderance of the evidence that his counsel's error "so prejudiced the defendant at trial that a different outcome would have resulted but for the error." *Doppler*, 590 N.W.2d at 633 (explaining *Strickland*, 466 U.S. at 687, 691).

Dukes has raised four ineffective assistance of counsel claims, each of which will be dealt with separately.

Admission of Guilt

Dukes first argues that he received ineffective assistance of trial counsel because counsel admitted Dukes' guilt without his permission. Dukes argues that in closing arguments counsel admitted Dukes' guilt to the aggravated robbery charge. In support of his argument, Dukes cites to the following remarks by counsel about Count 1, the aggravated robbery charge.

> Now we get to the weakest evidence in the case. It's Dukes' car, with two guys who pull up to a guy, and one of the men in the car say, "Give me your money", or try to rob him, Bennie Chaney. Clearly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney. Can you make the leap to him aiding and abetting an attempted intentional killing of Bennie Chaney during an attempted aggravated robbery? This gets complicated. Well, you may say there was an attempted aggravated robbery. And you may say there was an aiding and abetting. But what evidence do you have that Steve Morrison intended to kill him? * * * Count 1, both Lewis' plea and Lewis' explanation to McConnon put Derrick Dukes right into it right up to his hips. You know it. I know it. He's in deep trouble on Count 1.

Dukes' counsel went on to point out the evidence that would counter Dukes' guilt on Count 1, but he qualified his explanation by stating that the evidence was "[p]erhaps not as persuasive, and I wouldn't want to insult your intelligence on that issue, but there should be extreme doubt in your mind regarding the intent to kill of Chaney, and the intent to kill McKinney, perhaps not so much as Count 1." It appears that Dukes' counsel was arguing to the jury that even if they found Dukes guilty of aggravated robbery, they should not find him guilty of murder and attempted murder. However, when making this argument, counsel made a number of statements that could be interpreted as conceding Dukes' guilt to the aggravated robbery charge.

The aggravated robbery charge and the attempted murder charge are based on the incident involving Chaney, while the murder charge is based on the incident involving McKinney.

Both the murder and attempted murder charges are felony-murder charges under Minn. Stat. § 609.185(3). This section provides, "[w]hoever does any of the following is guilty of murder in the first degree * * * (3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit burglary, aggravated robbery * * *." Minn. Stat. § 609.185(3). Therefore, a concession of guilt to aggravated robbery essentially concedes most of the elements necessary to convict Dukes of the murder and attempted murder charges. Dukes was indicted under the aiding and abetting statute, § 609.05, which makes an individual liable for the crimes committed by those he intentionally assists. "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. To obtain a conviction under this statute, the state did not need to prove that Dukes committed any of the underlying crimes. Instead, the state needed to prove that *someone* committed the underlying crimes and Dukes intentionally assisted the person committing the crime.

Finally, Dukes was charged under the attempt statute for the attack on Chaney. Minn. Stat. § 609.17.

This charge requires only that the state prove that a "substantial step" toward the completed crime of first-degree murder was taken for Dukes to be found guilty. Minn. Stat. § 609.17. Therefore, if Dukes conceded guilt to the aggravated robbery charge, the only additional element the state needed to prove for the attempted murder was that one of Dukes'

accomplices took a substantial step toward intentionally killing Chaney-that Morrison acted intentionally when he fired at Chaney.

With respect to the charge of murdering McKinney, a concession of guilt to aggravated robbery undermines Dukes' defense that although he was present, he was unaware of the intentions of Morrison and Lewis. Once Dukes conceded that he participated in the aggravated robbery, he would no longer be able to claim that he unknowingly assisted Morrison and Lewis by driving them to Saint Paul. Arguably the state would not have to prove any further involvement by Dukes, but only would have to show that either Morrison or Lewis intentionally shot at McKinney during the commission of the robbery, which element was proven by Lewis' admission in his plea testimony. Therefore, if Dukes' counsel conceded guilt to the aggravated robbery charge, this concession arguably relieved the state of proving any of the other elements of the attempted murder and murder charges that were specific to Dukes' conduct.

When asserting an ineffective assistance of counsel claim, a defendant must generally prove prejudice under *Strickland*, but there are some Sixth Amendment right to counsel violations in which prejudice to the defendant will be presumed. *Strickland*, 466 U.S. at 692. One such instance is when counsel admits a defendant's guilt without the consent of the defendant. *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984). The decision to admit guilt is the defendant's decision to make. *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991). In situations when counsel admits guilt without the consent of the defendant, the defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission. *Wiplinger*, 343 N.W.2d at 861. In *State v. Moore*, the defendant's counsel argued that

the defendant should be found guilty of a lesser-included offense. 458 N.W.2d 90, 95-96 (Minn. 1990). We concluded that although this concession was a valid trial strategy, it could not be done without the defendant's consent. *Id.* at 96. In *Wiplinger*, we stated that it was improper for counsel to impliedly admit guilt through his cross-examination questions. 343 N.W.2d at 861. We then concluded that defense counsel was attempting to indirectly concede guilt so that his client could receive leniency in sentencing. *Id.*

Even if counsel admits guilt without the defendant's permission, no error will be found if the defendant acquiesced in the strategy. *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992). In *Provost*, we concluded that the defendant acquiesced in the admission because his counsel used the same strategy throughout trial and the defendant never objected. *Id.* In *Pilcher*, we concluded that the defendant acquiesced in the admission because counsel used the same strategy from beginning to end of trial, the defendant admitted that he understood the tactic, but he did not object. 472 N. W.2d at 337. At the other end of the spectrum, the defendants in both *Moore* and *Wiplinger* objected to the admission made by counsel before their cases were given to the juries. *Moore*, 458 N.W.2d at 96; *Wiplinger*, 343 N.W.2d at 861.

Here, unlike in *Pilcher* and *Provost*, Dukes' counsel did not use the same strategy throughout trial. In his opening statement, counsel stated that Dukes was an unknowing participant who was present only because he had agreed to drive Lewis and Morrison to someone's house in Saint Paul. Midtrial, counsel confirmed to the court that the defense strategy was to argue that Dukes was present, but not aware of Lewis' and Morrison's intentions to commit the crimes. More specifically, when discussing the admissibility of *Spriegl* evidence, the court inquired, "my understanding of the

defense's case at this point is that Mr. Dukes was there, he was in the car when both incidents happened, that he was not aware of what Mr. Morrison and Mr. Lewis were going to do. He did not participate. He could not have known what their intentions were. If things change * * *." Counsel for Dukes then responded, stating "It is not going to change, Your Honor." But in his closing argument, counsel argued to the jury only that they should not find that the murder and attempted murders were intentional. With respect to the aggravated robbery charge, counsel made statements that Dukes asserts were a concession of guilt. We note that Dukes did not object prior to the jury receiving the case as the defendant did in *Wiplinger*, but, unlike the defendants in *Pilcher* or *Provost*, Dukes did not listen to admissions of guilt throughout trial without objection.

The postconviction court did not address the merits of Dukes' ineffective assistance of counsel claim, holding that Dukes had waived the claim because it was not raised in his direct appeal. As noted earlier, the general rule is that claims raised or known at the time of direct appeal will not be considered on a petition for postconviction relief. *Knaffla*, 243 N.W.2d at 741. However, we have recognized that claims that require a court to explore conversations between attorney and client are best handled on a petition for postconviction relief. *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997). In *Robinson*, we explained, "[i]n order to evaluate such a claim, a court needs to hear testimony from the defendant, his or her trial attorney, and any other witnesses who have knowledge of conversations between the client and the attorney." *Id* We juxtaposed claims requiring evidence of attorney-client communications with other ineffective assistance of counsel claims that could "be evaluated by an appellate court on direct appeal based on the briefs and trial court transcript and without any additional factfinding." *Id* We held that

ineffective assistance of counsel claims that require additional factfinding are properly raised in a postconviction petition, even if they were known at the time of the defendant's direct appeal. *Id.*

The claim of whether Dukes consented to his counsel's admission of Dukes' guilt to aggravated robbery is exactly the type of claim that needs additional factfinding before it can be resolved. Here, the postconviction court did not weigh the merits of Dukes' claim, but instead concluded that the claim was procedurally barred. We conclude that the postconviction court needs to consider testimony from Dukes and his counsel in addition to reviewing the trial record before it can decide the merits of this claim. Therefore, we remand to the postconviction court for further proceedings regarding Dukes' claim that he was denied effective assistance of counsel because his counsel conceded his guilt to aggravated robbery.

Lewis' plea testimony

Dukes also argues that his trial counsel was ineffective because counsel requested admission of the entire Lewis plea transcript. Dukes asserts that the admission of the most incriminating statements was the result of a request by his counsel. Dukes misstates the record. Dukes' attorney objected to the admission of statements implicating Dukes. Once it became clear that the incriminating statements would be admitted, then, and only then, did Dukes' counsel request admission of Lewis' complete plea testimony so that the statements could be heard in context. Even if Dukes' argument had merit, this claim was known, but not raised, on direct appeal. *Robinson*, 567 N.W.2d at 495. Unlike the admission of guilt claim, this claim could have been decided based on the record without an evidentiary hearing. There is no need for the court to inquire into the conversations

between attorney and client to determine whether Dukes' attorney was ineffective in his handling of the Lewis plea testimony. We conclude that the postconviction court correctly found that Dukes was procedurally barred from raising the claim that his trial counsel was ineffective in his advocacy relating to the admission of the Lewis plea testimony.

Use of *Williamson v. United States*

Dukes' third ineffective assistance of counsel claim relates to his appellate counsel. Dukes asserts that his appellate counsel did not discuss *Williamson v.United States* in her brief to us on direct appeal. 512 U.S. 594 (1994). *Williamson* is a leading Supreme Court case discussing the admissibility of statements under the "statement against interest" exception to the hearsay rule. *Id.* at 596. At Dukes' trial, the court considered *Williamson* and both defense counsel and the state argued at length about its meaning when the court was determining the admissibility of Lewis' plea testimony. Despite *Williamson*'s importance, appellate counsel failed to mention Williamson in her brief, let alone discuss how it should apply to Lewis' plea testimony.

The Supreme Court has indicated that courts may proceed directly to the second prong of the ineffective assistance analysis and first analyze whether the defendant was prejudiced. *Strickland*, 466 U.S. at 697. Thus, in instances where there is no actual prejudice, courts can avoid evaluating the performance of counsel. *Id.* The Supreme Court also has encouraged courts to "strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.* Therefore, we will first consider whether Dukes was prejudiced by any potential error by counsel. To prove

prejudice, Dukes must be able to show that absent his appellate counsel's error, the outcome of his direct appeal would have been different. *See id.* Even though Dukes' counsel did not discuss or cite to *Williamson*, the state did raise *Williamson* and we addressed the case when deciding the direct appeal. Further, we fully analyzed *Williamson* and concluded that the admission of Lewis' plea testimony conformed to the Supreme Court's requirements in *Williamson*. Dukes, 544 N.W.2d at 18-19. Dukes cannot show that he was prejudiced by counsel's omission. Therefore, we conclude that the postconviction court did not abuse its discretion in denying relief on this claim.

Failure to advise of ineffective assistance of trial counsel claims

Dukes' final ineffective assistance of counsel claim is that his appellate counsel failed to advise him of any potential ineffective assistance of trial counsel claims and that such claims needed to be raised in his direct appeal. The postconviction court concluded that Dukes did not prove appellate counsel's performance fell below an objective standard of reasonableness and that Dukes did not prove prejudice. The court did not make any factual findings on these claims.

As with the previous claims, Dukes must show that he was prejudiced by any potential error made by his appellate counsel. *Strickland*, 466 U.S. at 697. Dukes maintains that if we conclude his ineffective assistance of trial counsel claims are waived because they were not raised on direct appeal, then he was prejudiced by the failure of his appellate counsel to advise him of the proper procedure to raise the claims. The first ineffective assistance of trial counsel claim that the postconviction court found Dukes had waived is that his

counsel was deficient because he admitted Dukes' guilt without Dukes' consent. Because we have decided to remand this claim, Dukes cannot show he was prejudiced by his appellate counsel's failure to advise him on this claim. On remand, he will have the claim heard on the merits.

The second ineffective assistance of trial counsel claim that Dukes may have waived is that trial counsel did not prevent the admission of the incriminating parts of Lewis' plea testimony. We have concluded that Dukes' claim relating to his trial counsel's handling of the Lewis plea testimony is barred because the claim was known, but not raised, on direct appeal. *Knaffla*, 243 N.W.2d at 741. However, the fact that the claim is now barred is not enough to show prejudice. Dukes also must show that absent his appellate counsel's failure to advise him of the proper procedure for raising the claim, there was a reasonable probability that the outcome of his direct appeal would have been different. *Strickland*, 466 U.S. at 694. Dukes cannot make such a showing.

We concluded on direct appeal that the plea testimony admitted against Dukes was proper under both the exception to the hearsay rule and the Confrontation Clause. *Dukes*, 544 N.W.2d at 19. It is highly unlikely that we would have reached that conclusion on direct appeal and in the same opinion concluded that his trial counsel's representation fell below the "objective standard of reasonableness" in his attempts to limit the admission of the same statements. *Strickland*, 466 U.S. at 688. It is incongruous to conclude that counsel's advocacy was unreasonably deficient because he failed to prevent the admission of evidence that we concluded was properly admitted. Therefore, regardless of whether his appellate counsel's representation fell below an objective standard of reasonableness on this claim, Dukes cannot show that he was prejudiced by her failure to advise

him of this claim. Accordingly, we conclude that the postconviction court did not abuse its discretion in denying relief on this ineffective assistance of appellate counsel claim.

III.

Dukes' next argument is that the postconviction court abused its discretion when it failed to consider the merits of his equal protection and due process claim that his sentence is improper relative to the sentence imposed on Lewis. Dukes claims that disparate levels of culpability-blameworthiness-cannot explain the difference between the two sentences and therefore the sentence imposed on him violates his right to equal protection and due process. Dukes' argument is essentially an equal protection argument.

Dukes was sentenced to consecutive terms for first-degree murder and first-degree attempted murder. However, after being found guilty on the same charges, Lewis was sentenced to concurrent terms for the same two convictions. *State v. Lewis*, 547 N.W.2d 360, 361(Minn.1996). Dukes asserts that he is less blameworthy because the evidence presented at both trials established that Lewis was the one who actually shot McKinney, while Dukes drove the car used to commit the crime.

In Dukes' direct appeal, we concluded that the district court did not abuse its discretion in imposing consecutive sentences on Dukes because his participation in the crime was not so passive that the imposition of consecutive sentences exaggerated his culpability. *Dukes*, 544 N.W.2d at 20. Because the issue was not raised, we did not consider whether the imposition of different sentences on fellow defendants by the same judge violated Dukes' right to equal protection. *Id*

However, Lewis was sentenced prior to Dukes' direct appeal. Claims known but not raised on direct appeal will not be considered on a subsequent petition for postconviction relief. *Knaffla*, 243 N.W.2d at 741. Accordingly, we hold that the postconviction court's conclusion that Dukes was procedurally barred from raising this claim is not clearly erroneous.

IV.

Dukes' next claim relates to newly-discovered falsified testimony by Lewis. As an attachment to his postconviction petition, Dukes submitted an affidavit by Kevin Lewis, n/k/a Hannabal Shaddai, in which Lewis stated that he lied in his plea testimony because he was trying to obtain the benefit of the plea. The postconviction court denied Dukes relief on this claim, concluding that the new evidence was "cumulative, impeaching, doubtful, and would probably not produce an acquittal * * *." The language used by the court suggests that the court was following the test for determining when to grant a new trial based on newly-discovered evidence. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). This test requires that a defendant must prove four elements before he will be entitled to a new trial: (1) that the evidence was not known to the defendant or his counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result. *Id.*

Although the four-prong *Rainer* test is the correct test for newly-discovered evidence, it is not the correct test when a court reviews an allegation that false testimony was given at trial. See *Sutherlin v. State*, 574 N.W.2d 428, 433 (Minn. 1998). When it is alleged that false testimony was given at

trial, the court must evaluate the claim under the three-prong test articulated by the 7th Circuit in *Larrison v. United States*, 24 F.2d 82 (7th Cir.1928). *Sutherlin*, 574 N.W.2d. at 433. We have previously examined the differences between these two tests. In *State v. Caldwell*, we concluded that analysis newly-discovered evidence in cases involving witness recantation should not be an analysis of the impact of the recantation, but should be an analysis of the effect that the absence of the false testimony would have had on the result in the original trial. 322 N.W.2d 574, 585 (Minn. 1982). The test for newly-discovered falsified testimony provides that in order to grant a new trial: (1) the court must be 'reasonably well satisfied' that the [trial] testimony was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise at trial or did not know of the falsity until after trial. *Sutherlin*, 574 N.W.2d at 433 (citing *Caldwell*, 322 N.W.2d at 584-85).

The postconviction court did not conduct an analysis or make any findings on any of the *Larrison* criteria, although there is evidence in the record that would support either the grant or the denial of relief. Lewis' affidavit directly contradicts his plea testimony, which was substantially referenced by both the state and Dukes. However, there is other evidence in the record in support of Dukes' participation. Although Dukes was not surprised in the sense that he did not know what Lewis had stated in his plea testimony, he was surprised that the plea testimony would be used in place of live testimony by Lewis, because Lewis withdrew his plea and refused to testify after Dukes' trial had already begun. These factual disputes are the type that a postconviction court must resolve when evaluating a claim of newly-discovered falsified trail testimony. We conclude that there are factual disputes on this claim and that the postconviction court did not apply the correct test in evaluating the recanted testimony. Therefore,

we remand this claim for an application of the three-prong *Larrison* test and for findings as to whether a new trial is warranted by the newly-discovered falsified testimony.

V.

The final question we address is Dukes' argument that the postconviction court abdicated its duties as a "neutral arbitrator" when it "promptly" and verbatim adopted the proposed findings submitted by the state. He argues that this action by the postconviction court prejudiced him because none of the evidence he presented at the hearing, particularly the testimony of his expert witness, is reflected in the court's findings. Dukes asserts that he was denied procedural due process because the court "relinquished [its] duty to conduct an independent review * * *."

Dukes relies on *Anderson v. City of Bessemer City* for the proposition that appellate courts should be "extremely leery and circumspect" of findings prepared by one party and accepted without change by the court. 470 U.S. 564, 572 (1985). In *Anderson*, the United States Supreme Court criticized the practice of courts adopting verbatim the findings prepared by the prevailing party, particularly if the findings "have taken the form of conclusory statements unsupported by citation to the record." *Id.* As the Ninth Circuit explained in *Bradley v. Maryland Casualty Co.*, the problem with verbatim adoption of one party's findings is that it can make it more difficult to determine whether a court exercised its "own careful consideration of the evidence, of the witnesses, and of the entire case." 382 F.2d 415, 423 (9th Circuit 1967). We agree that it is preferable for a court to independently develop its own findings. Therefore, when we review a court's verbatim adoption of one party's proposed findings, we will

heed how the findings were prepared when we conduct a careful and searching review of the record. We will devote special care "not in the test that we apply to a particular finding of fact-individual findings will only be reversed if clearly erroneous-but in the volume of evidence we sift in judging the correctness of such findings * * *." *Berger v. Iron Workers Reinforced Rodmen Local* 201, 843 F.2d 1395, 1408 (D.C. Cir.1988) (emphasis removed). However, if after such a review we conclude that the findings are not clearly erroneous, the verbatim adoption, standing alone, will not be insufficient grounds for reversal.

Here, as a result of the postconviction court having adopted verbatim the state's proposed findings, we have devoted special care in our review of the record. After such review, we conclude that with the exception of the findings on the two remanded claims, the findings are not clearly erroneous; therefore, we hold that the postconviction court's verbatim adoption of the state's proposed findings, standing alone, does not constitute grounds for reversal.

Affirmed in part and remanded in part.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

File No. K6-94-2275

Derrick Ramon Dukes,

Petitioner,

vs.

State of Minnesota,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING RELIEF

The above-entitled matter was remanded by the Minnesota Supreme Court in their decision in Dukes v. State, 621 N.W.2d 246 (Minn. 2001). After the decision was handed down, the Petitioner requested leave to re-open the record. The request was granted and the matter came on for an additional evidentiary hearing on October 10, 2001.

Petitioner was personally present and represented by Deborah Ellis, Esq. Mark N. Lystig, Assistant Ramsey County Attorney, appeared on behalf of Respondent, the State of Minnesota.

After said hearing, both counsel were granted leave to submit written memoranda arguing their respective positions.

Based upon the evidence adduced at this hearing, the arguments and submissions of counsel, the initial post-conviction hearing and upon all the files and records herein, the court now makes the following:

FINDINGS OF FACT

1. The legal and factual bases to establish the claim that Petitioner's conviction was obtained by the use of false testimony at trial were known to Petitioner at the time of his direct appeal.

2. Petitioner has not shown why fairness requires that this claim be considered in a post conviction proceeding.

3. The court is not reasonably well satisfied that Kevin Lewis' guilty plea testimony was false.

4. There is sufficient evidence in the record other than Lewis' plea testimony to sustain the jury verdicts and the jury would not have reached a different conclusion without the testimony.

5. Petitioner was not surprised by the introduction of the transcript of Lewis' testimony at trial.

6. Because trial counsel did not intend to concede guilt, there is no evidence in the record that counsel discussed such a strategy or that Petitioner explicitly agreed to such a strategy.

7. Petitioner's trial counsel testified that he did not intend to make and did not make any statements that could be considered as concessions of Petitioner's guilt.

8. Counsel's strategy was consistent throughout the trial.

9. The statements in the final argument, considered in the totality of the circumstances and were not necessarily concessions of Petitioner's guilt as to any element.

10. The legal and factual bases for the claim that Petitioner was denied the effective assistance of counsel at trial because his counsel may have made concessions of guilt during final argument were known and available to Petitioner at the time of his direct appeal.

11. Petitioner has not shown why the claim should in fairness be considered in a subsequent post conviction proceeding.

CONCLUSIONS OF LAW

1. Petitioner is procedurally barred from raising the claim that his conviction was obtained by the use of false testimony at trial. The legal and factual bases necessary to raise the claim were available at the time of the direct appeal. Fairness does not require consideration of the issue.

2. Petitioner has not carried his burden of proof in a post conviction proceeding to establish that his conviction was obtained by the use of false testimony.

a. The court is not reasonably well satisfied that Kevin Lewis' guilty plea testimony was false.

b. There is sufficient evidence in the record other than Lewis' plea testimony to sustain the jury verdicts and the jury would not have reached a different conclusion without the testimony.

c. Petitioner was not surprised by the introduction of the transcript of Lewis' testimony at trial.

3. Petitioner was not denied the effective assistance of counsel at trial.

4. The result of the trial was reliable. Petitioner has not shown that he was prejudiced by counsel's final argument.

5. The legal and factual bases for the claim that Petitioner was denied the effective assistance of counsel at trial were known to Petitioner at the time of the direct appeal. The claim is procedurally barred from consideration in a post conviction proceeding.

ORDER

1. After reconsideration of the post conviction claims upon remand, Petitioner is not entitled to post conviction relief and his petition for post conviction relief is hereby denied.

2. The attached memorandum is hereby incorporated by reference as part of this Order.

BY THE COURT:

s/_____
SALVADOR M. ROSAS
JUDGE OF DISTRICT COURT

Dated: February 7, 2002

MEMORANDUM OF LAW

THE TESTIMONY OF KEVIN LEWIS

In Dukes v. State, 621 N.W.2d 246 (Minn. 2001), the Minnesota Supreme Court characterized the handwritten, five sentence affidavit dated June 24, 1998 as resulting in "newly discovered falsified testimony". This court was then instructed to conduct an analysis evaluating "the recanted testimony" using the three prong test in Larrison v. United States, 24 F.2d 82 (7th Cir.1928) as adopted in Sutherlin v. State, 574 N.W. 2d 428, 433 (Minn. 1998).

I.

This court is not reasonably well satisfied that Lewis' plea testimony was false or that his affidavit, executed approximately four years later, is true. The affidavit only contains the bald assertion that the plea testimony was "a lie" and provides no other details explaining how his plea testimony was false. For example, Lewis' plea statement contained information that was beneficial to Petitioner at trial. Petitioner relied on parts of Lewis plea testimony as truthful evidence to establish his limited involvement in the actual assaults on Chaney and McKinney. Was the plea testimony which was inculpatory to Lewis and exculpatory of Petitioner all "a lie?"

At trial, this court after much consideration ruled that there were sufficient guarantees of trustworthiness to permit the introduction of portions of Lewis' plea testimony at trial. (T.50). Lewis' plea testimony was consistent with other evidence at trial. The Court in State v. Dukes, 544 N.W.2d 13 (Minn. 1996), affirmed that ruling by saying, "We conclude that under Williamson the redacted Lewis statement was

properly admitted against a hearsay challenge because its inculpatory nature gave it a high degree of trustworthiness." Dukes at 19.

Despite concerns expressed during counsel's arguments, this court concluded that Lewis' statement would ultimately result in a substantial period of incarceration for him and was reliable. Lewis' affidavit, executed long after his own conviction and without any guarantees of trustworthiness, does not change that initial determination. Petitioner has failed to meet the first prong of the Larrison test.

II

The second prong in Larrison is whether "the jury might have reached a different conclusion" without the testimony. There was sufficient evidence in this case to convict Petitioner without the plea testimony of Lewis. Petitioner was identified in a photo lineup before trial and at trial as one of the perpetrators. Benny Chaney identified Petitioner as the one who shot at Chaney. Petitioner's car was identified by license plate at the scene. Petitioner's mother testified that only Petitioner drives the car. Petitioner had a motive to commit a robbery to obtain money to assist his girlfriend in making a restitution payment. The murder weapon was found after the crime in Petitioner's coat at his place of employment. Petitioner made statements to police investigators which turned out to be false.

In addition, without admission of the plea transcript, Petitioner would not have been able to minimize his involvement as he did at trial. Lewis' testimony allowed Petitioner to. claim that his involvement was limited.

Petitioner has failed to meet the second prong of the Larrison test.

III

The third and final prong of the Larrison test is whether the Petitioner was taken by surprise and did not know of the falsity until after trial. Petitioner had been provided with a transcript of Lewis' plea testimony well before trial. At trial, the Petitioner did not claim that he was surprised by the evidence or request a continuance to investigate or otherwise prepare. If Lewis had testified in person at Petitioner's trial, then perhaps the Petitioner could argue more persuasively that he was surprised if Lewis' live testimony was inconsistent with his plea testimony. As a matter of fact, the Petitioner used the evidence affirmatively to aid his defense.

Before commencement of trial, trial counsel were aware that Lewis had changed attorneys and that there was a possibility that Lewis would not testify at Petitioner's trial. After jury selection, but before testimony, Lewis' new counsel advised this court and trial counsel that Lewis would not testify. Upon said notification, Petitioner's trial counsel was prepared to argue the issue of the introduction of Lewis' plea testimony. Again, Petitioner's trial counsel never indicated surprise and never requested additional time to prepare.

Finally, Petitioner would necessarily have known that statements concerning Petitioner's involvement were either true or false as soon as the statements were made. Petitioner made no offer-of-proof at trial to show that the testimony was false.

Petitioner has not met his burden of showing that any of the three prongs of the Larrison test were met.

THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Petitioner argues that he received ineffective assistance of trial counsel because counsel admitted Petitioner's guilt without permission. In remanding this matter, the Court in Dukes v. State, 621 N.W.2d 246,255 (Minn.2001) instructed this court to consider the testimony of Petitioner and his trial counsel and the trial record in deciding the merits of this post conviction claim.

This court feels it necessary to note that, since the jury trial in September of 1994, Petitioner has never previously raised this claim. Obviously he was present throughout trial and heard every word uttered on his behalf by his trial attorney: Petitioner's experienced appellate counsel in the direct appeal did not identify the statements as concessions, even though such a concessions might be automatic grounds for a new trial. Petitioner subsequently claimed that his appellate attorney was ineffective. In the direct appeal, the Minnesota Supreme Court did not identify the statements as concessions of guilt or cause for action, since the Court affirmed the conviction without reference to the statements. Most recently, the Court characterizes trial counsel's final argument using words like "it appears', "could be interpreted" and "if Dukes conceded". See Dukes v. State, 621 N.W.2d 246, 253, 254, 255.

In reviewing the transcript of trial counsel's closing argument, this court is not convinced that counsel's statements were concessions of guilt. Petitioner's trial counsel testified that the defense strategy was to acknowledge that Petitioner was present during the commission of the crimes but did not participate. Trial counsel further testified that he did not discuss a change in this strategy with Petitioner and did not

concede guilt to any crime. Trial counsel was never asked if he ever discussed with the Petitioner actual details of how the case would be tried from a tactical perspective.

A criminal jury trial is a pressure filled, constantly flowing process that requires frequent tactical adjustments. Trial attorneys do not typically have the luxury of reviewing transcripts or having law clerks research issues before they make decisions.

If trial counsel conceded anything in his closing argument, he might have conceded the strength of the state's case or acknowledged weaknesses in his client's case. Such a concession might have been calculated to enhance trial counsel's credibility in the eyes of the jury. That might not have been the best tactic, but who is in the best position to know what the best tactic would be? A different attorney might have used different tactics or different words.

Some attorneys may have made an unrealistic argument thereby losing credibility with the jury. Other attorneys might have remained silent on these points and it would not be difficult to find attorneys who would be prepared to second-guess or criticize the tactical decisions of a fellow attorney.

In reviewing the entire trial transcript, legal arguments and objections, and the examination of witnesses, this court cannot conclude that the Petitioner received ineffective assistance of counsel at trial. As far as the opening and closing statements are concerned, the jury was instructed before and after trial that the statements and arguments of the attorneys are not evidence and are not to be considered as such by the jury.

Petitioner has not carried his burden of showing that counsel's statements in the final argument were concessions of guilt. If the statements are construed as concessions of guilt, then Petitioner acquiesced in the strategy by failing to object at trial or to raise the issue in a motion for a new trial or on direct appeal.

Petitioner has not shown that counsel's performance fell below an objective standard of reasonable professional assistance. See State v. Wiplinger, 343 N.W.2d 858 (Minn. 1984), and the subsequent decision of the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052) 80 L.Ed.2d 674 (1984). SMR

* * *

MR. COLEMAN: Thank you, Your Honor, may it please the Court, counsel, Mr. Dukes. Ladies and gentlemen of the jury. You may recall that I stood up in front of you during the opening statement and told you that this was two bungled holdups, and an unintentional death, an unintentional and unexpected and unplanned death. I think the facts have borne that out. As a result you will be required to acquit Mr. Dukes of the murder charges in this case.

You're going to get a copy of the judge's jury instructions to take into the jury room with you. One copy. I'll be making reference to some of the instructions in here and what they mean. Some of them will be much like what you've already seen in the form of these visual aids. You will also have in the jury room a copy of the plea of Kevin Lewis, Exhibit 15. I'll be making reference to certain pages of that transcript in this final argument. I'll be directing your attention to certain pages in that transcript. There will only be one copy for you to look at. I'll be making reference to the testimony of Kevin McConnon as to what Mr. Lewis said after he pled guilty and went downstairs.

I told you in the opening statement that Kevin Lewis lied. And he did. He lied when he pled guilty. He lied to get a plea bargain. The judge, I believe, is going to instruct you that there's certain ways that you evaluate the credibility of the testimony of a witness. Every witness Dr. French, Jim Gag, Dr. McGee. Kevin Lewis. You have the testimony of an accomplice in this case, Kevin Lewis, and you never saw him. You never heard his voice. You don't even know what he looks like. How are you going to evaluate the credibility of that witness? Using these factors: Their interest or lack of interest in the outcome of the case. Now, what is Mr. Lewis' interest in the outcome of the case? At least when he originally pled guilty back in June. Well, we know that when Mr. Lewis pled guilty back in June, at page 12 of Exhibit 15

the question to him is this: "And if, the judge imposed a consecutive sentence for attempted murder in the first degree, you would be required to serve at least ten years on that term before you would be eligible for parole on either one of them. Do you understand that?

Answer: Yes.

Question: If you went to trial and were convicted, and the judge were to impose consecutive sentences, you would be looking at a minimum of 40 years imprisonment. Do you understand that?

Answer: Yes."

Later on at page 12, the question is, in the middle of the question: "And with good time, that will be reduced to around 20 years, do you understand that? Do you understand that? That means 20 years."

Does Kevin Lewis have an interest in the outcome when he pled guilty?

Next, the relationship to the parties. Well, the relationship as the state would have it is that they're friends and aiders and abettors, and that when Kevin Lewis went and talked to Kevin McConnon and said to Kevin McConnon after he had pled guilty, his deal was all wrapped up, neat and tidy, he told Kevin McConnon, according to what Kevin McConnon said, and you won't be getting a report of that. There will be no report of this. The defendant said that, Dukes, the other co-defendant needed money. And the defendant and Morrison were going to help him commit a robbery so that he could get the money.

Does that sound like a friend helping someone out? Does that sound like he was helping him out? Doesn't sound to me like he was helping him out. It sounds like he's making Derrick Dukes an aider and abettor in an attempted aggravated robbery.

The ability and opportunity know, remember and relate the facts. What can you tell about Kevin Lewis? Look

at Exhibit 15. Exhibit 15, the transcript of his plea of guilty, is as I told you in the opening statement primarily leading questions by the prosecutor that elicit a response by Mr. Lewis such as "yes". "Okay". "I guess". This isn't the testimony of Kevin Lewis. I submit to you, it's the testimony of the prosecution getting him to say the words, or agree with the question in order to support the facts to get a plea of guilty in so he can get his plea bargain. Because you'll see in Exhibit 15 that Mr. Lewis at page 4 when being asked by the Court: "Mr. Lewis, do you have any questions about the plea agreement before we go any further here?" The defendant Lewis: "Yeah. I just want to know how many years I'll be doing. I want somebody to say it right now."

That's what Kevin Lewis was thinking about. He was getting ready to say whatever he had to say to get the deal that he'd been promised. And you recall, there was a break at page 6 in Exhibit 15 where they go off the record, and his lawyer at that time comes on and says: "It's my understanding that Mr. Lewis still wishes to go forward. He had questions about his obligation to testify. We have reviewed that again." And then they go forward. Then they ask the questions and they put in the factual basis, as they call it, in order to establish sufficient facts, elements to support a plea of guilty to attempted murder in the first degree of Bennie Chaney, and murder in the second degree, intentional death of Joe McKinney.

Now, there's only one of these for you to look at when you get into the jury room, and whoever has it, don't hog it, pass it and let people see it, because it's important that you all have a chance to see some of these things. And don't just rely on what I'm saying here now and what Mr. Lystig read into the record. But the question that's put to Mr. Lewis, page 18; "Do you understand when Mr. Morrison pointed the gun at Mr. Chaney, he was pointing it, shooting to hit him; correct?

Answer: I don't know."

And then they get him to say "I guess.

Yes." They get him to finally say yes. I guess.

Yes.

When they get deeper in and they get into the part about what happened after the shooting with Chaney, page 21. Lewis is saying " Steve got mad and jumped out of the car. And we thought he was going home. And we seen him pull his gun out. So we knew that he was going to try to rob Joe McKinney."

Doesn't say we. It says he. Now, it goes on furtherance, this is really the meat and potatoes of what happened here. At page 23.

Question: what was he doing?

Answer: I guess he was trying to rob him.

Further down.

Question: what was Mr. Dukes doing?

Answer: I don't know. I wasn't looking at him.

I was looking inside Joe McKinney's car.

Question: what did you see Mr. McKinney do?

He moved, and he was moving his hand and I heard Steve shoot something. So I shot. I tried to scare him.

Okay.

Answer: And he moved into the bullet.

Now, do you understand that all of you had gone to Saint Paul to rob someone?

Then it goes on further ladies and gentlemen of the jury. It goes on further until finally, finally they get him to say "I shot and meant to kill him", to get his plea bargain.

Now if his plea bargain is in and he has nothing to hide, and everything is wrapped up, then why does he go to Kevin McConnon and tell Kevin McConnon Morrison decided to rob the victim, although that wasn't the intent of Dukes or the defendant?

Then he goes on, the defendant thought the victim was going for a gun or something so he fired because he was

scared. And at the very end, the very end, he said that he was truly sorry that he had killed someone, especially over something stupid. He said he was sorry that it happened and he didn't intend to kill anyone. Clearly did not intend to kill anyone.

You have, ladies and gentlemen of the jury, I submit, a plea petition of Kevin Lewis as a witness. No opportunity for me to ask any questions of that document, that exhibit. No opportunity to observe their manner and appearance; their age and experience; or their frankness and sincerity.

Do you find that that plea of guilty is frank and sincere, or is it truly what he told the probation officer, that is frank and sincere. He was sorry. It was stupid. He didn't intend to kill anyone.

The reasonableness or unreasonableness of their testimony in light of all the other evidence in this case. Is it reasonable that Kevin Lewis would say anything he had to say to get 20 years off of a 40-year sentence?

Number 8. Any impeachment of their testimony. Impeachment of the testimony is this, it's what he told Kevin McConnon. It's what he told Tomika Christmas. It's when you say something on the witness stand, or as Exhibit 15, and then someone puts someone up there and says "No, he didn't. He said this. He said something different." Do you think that Kevin McConnon lied? Do you think Tomika Christmas lied about what Kevin Lewis said? You have good reason to believe that's what Kevin Lewis told these people, and that's impeachment, Exhibit 15, and it impeaches the crucial element, especially intent to kill. I'm not saying that there wasn't a crime committed and it wasn't a crime of murder. It was an unintentional murder by Kevin Lewis.

Number 9. Finally, any other factors that bear upon the believability and weight. And in the last analysis, use your own experience, good judgment and common sense. Common sense tells you that this Exhibit 15, this plea

bargain, 20 years off 40 years is why Kevin Lewis said what he had to say.

Now, that moves on to another instruction I believe the judge will give you about the accomplice Kevin Lewis. The man you never saw. Morrison, an accomplice, but who didn't testify: So this instruction doesn't apply to him since there was no evidence from what Mr. Morrison said, or didn't say. But you can't find Mr. Dukes' guilt upon what Morrison, what Lewis said in this plea. Unless there's corroborating evidence.

Now, there is corroborating evidence. Don't mistake me for a moment that I'm saying there's none. But what corroborating evidence do you have on the intent of Kevin Lewis, other than what Kevin Lewis said? You don't have someone that said Kevin Lewis walked up to him and said "I intend to kill you". Which would be clear. That he put the gun right to his head, intended to kill him. You have evidence in this case that he pulled the gun on Chaney. Well, if he intended to kill someone when he went to Saint Paul, why didn't he open the door, blast Chaney point-blank, and take his wallet. If they intended to kill Joe McKinney, why didn't Morrison walk up to the car, put the gun to his head, and pull the trigger? Because they didn't intend to kill, they intended to rob.

Now, it is true, it is true under liability for crimes of another that if the crime is reasonably foreseeable that takes place during the intended crime, and in this case the intended crime being robbery, then you're guilty of that, too. And it is reasonably foreseeable to think if you bring a gun to ,a hold-up and someone gets shot and dies, that you are likewise responsible for it. But it's not the reasonably foreseeable that someone gets shot. You have to believe that reasonably someone could get up, intentionally shoot or intentionally shot. And what you have here is it's reasonably foreseeable under the facts of this case that Joe McKinney was

unintentionally shot by the bullet that's been put into evidence in this case.

Now, you have some evidence regarding that bullet, but you also have something regarding the casing. We know that the magazine was loaded, and we know that there was one casing found at the scene indicative of a single shot from a semiautomatic weapon. No other casings there. Any other shooting done by Morrison is not to be made part of what Lewis' shooting was to be. He shot one time. He was afraid. He tried to scare him. He didn't try to kill him. And that's why you're going to have a hard time, because it was Good Friday, there is a young man needlessly dead in this county. But the state has tried to say it's as a result of an intentional act of Kevin Lewis, and they want him to do the time. It wasn't an intentional act. You know who pulled the trigger.

Now, you think he's aiding and abetting. That's just fine. But was he aiding and abetting an intentional act of murder? Or was it aiding and abetting an unintentional act? You have a hard decision, because you don't have the choice to find him guilty of unintentional murder. Murder in the first degree, with this visual aid I'm showing you requires two things that I would like to point out, and in this case three. That you may recall, I started off this case telling you to keep your eyes open for three things, aiding and abetting, attempt and intentional or some form of the verb. Now, I've discussed intentional somewhat already. It's a process of the mind that you can't normally see. It's in the instructions from which you can make certain inferences.

I want to now go to attempt, because this should be looked at in terms of the attempted murder of Bennie Chaney. Because as you remember, Kevin Lewis told Kevin McConnon after the deal was all sealed, he did say it was an attempted robbery, not an attempted murder. They went there to rob someone. They didn't go there to kill anyone. So if you have an attempted robbery, then you must have an intentional

act to attempt to kill Bennie Chaney. What is the intentional act? The intentional act the state would have you believe is this, shooting a gun at Bennie Chaney is an intentional act, therefore when you shoot a gun, no matter what, it's an intent to kill him. That doesn't make sense. Think about it. What if you intended to shoot him in the foot? What if you intended to shoot it next to him. What if you intended not to kill him? Well, if you did, then it would be unintentional during the course of a felony. Every time someone picks up a gun and shoots at someone, that doesn't mean that they intend to kill them. And in this case, as I told you, this is not an organized plan, this is disorganized crime. The intent is to rob. There was no intent to kill. And is there an attempt to commit the crime of aggravated robbery?

Switch gears with me, here. I was arguing the strongest evidence in this case. Now we go to the middle-sized evidence. Is there evidence that indicates that Mr. Dukes and Mr. Lewis were aiding and abetting an attempted robbery of Joe McKinney? Well, clearly Morrison was going to rob him. He was there, put the gun to his head with the four kids that said "Give me your money and jewelry", one of the kids said. Now, if that isn't attempted robbery, I don't know what is.

Now, the question is were Lewis and Dukes in on it with him? You look at Exhibit 15. The unspeaking exhibit up there, and you have in his plea he admits, "Yeah, that's what we were doing when we got to Bennie Chaney." But when he talks to McConnon he said there was an argument. Steve and Derrick had an argument. And Steve got out of the car. They had decided after the failed robbery to go home. And then there was an argument, and Steve got out of the car. Now, you can clearly take into account what a person does before, during and after, and I suggest you do, because the evidence here of before and after is strong. But before, during. What's the during here? There's a break. Morrison goes out on his own. And then because they didn't leave, and they say, and

they watch, perhaps their mere presence and not leaving indicates aiding and abetting. And who is aiding and abetting at this point? Is it Lewis has now rejoined the attempted aggravated robbery of McKinney and Dukes is not? Or is it still a concerted action?

Now, the evidence would allow you to infer, I agree, yes, it was still a concerted action, but there is less evidence than on the intent to show that perhaps Dukes was not.

Now we get to the weakest evidence in the case. It's Dukes' car, with two guys who pull up to a guy, and one of the men in the car say, "Give me your money", or try to rob him, Bennie Chaney. Clearly it would seem to be Mr. Dukes is aiding and abetting an attempted aggravated robbery of Bennie Chaney. Can you make the leap to him aiding an abetting an attempted intentional killing of Bennie Chaney during an attempted aggravated robbery? This gets complicated. Well, you may say there was an attempted aggravated robbery. And you may say that there was an aiding and abetting. But what evidence do you have that Steve Morrison intended to kill him? Once again, every time you shoot a gun, it doesn't mean you're going to try to kill someone. And Sergeant Weisman on the witness stand when asked, Bennie Chaney said he was running away. I heard two shots and I turned.

Bennie Chaney, whose memory improves with time, gets up on the witness stand and says, "No, I saw him shoot at me." Now, Bennie Chaney also told you as you will recall that he was standing on the northwest corner of the park when the car pulled up to him. Now, the videotape introduced in here as well as Sergeant Weisman's testimony has him standing on the southwest corner. Bennie Chaney made a mistake. Who cares what corner he was standing on as to whether or not there was an aggravated robbery? But it does go to show the fact that he says "I thought I was going to be dead." Maybe something put in his mind or thought. For

instance, it's really not what's in Mr. Chaney 's mind on whether he thought these guys were intending to kill him. It's in the mind of the people doing the shooting. Don't twist it around. What this guy thinks when he's being shot at is important, I think, in human nature, but it's the intent of the person doing the shooting. Because if you're trying to scare someone to think that they might get shot, but you don't intend to do that, maybe, that's just your whole purpose in shooting at him, to scare him. But it's not an attempted murder in the first degree.

Now, I would like to respond to some specific arguments made by the prosecution. You will have an opportunity, as mentioned by Miss Beltaos, to use circumstantial evidence in this case. And there is circumstantial evidence, no doubt. And what I mean to tell you is this. In order to find someone guilty by proof beyond reasonable doubt, when you have circumstantial evidence, because there is some, you have to have all reasonable inferences that lead to that conclusion. To the exclusion of any other reasonable inference. Make it more simple. You can figure out that maybe these guys intended to kill McKinney, and maybe they intended to kill Chaney, based upon the evidence. Because I can reasonably infer that. No one would say you're stupid. No one would say that's impossible. How can you come up with that thought? But you likewise can make the reasonable inference that there was no intent to kill McKinney, and there was no intent to kill Chaney. And since you have two inferences that are both reasonable based upon the circumstantial evidence, you have in effect an example of reasonable doubt in your minds, in your application of logic to the facts. Now, that's where it becomes problematic, because the prosecution would have you be objective, would have you not get involved with your emotions and your thoughts and your feelings about how can we let this guy go

on this murder and attempted murder. Someone is dead. I feel really bad about that.

Well, if you're going to be objective, and as sworn officers, jurors of the Court, and follow your oath, and take the facts and apply them to the law, you have to come up with a conclusion of not guilty. And that's going to be hard. Because proof beyond a reasonable doubt is the highest standard. You have a standard that's called prima facie,-it just means on its face it looks like it's true. You have probable cause to believe. Probable cause to believe it's probably true.

You have the preponderance of the evidence that they use in civil cases 51 percent, you win.

You have clear and convincing evidence.

Clear and convincing evidence.

And then you have the standard of proof, of proof beyond a reasonable doubt. And you have reasonable doubts in this case on the intent to kill Joe McKinney by Lewis, and the attempted intent to kill on Chaney by Morrison. You may not have reasonable doubts on the issue of aiding and abetting, either two of the three or three of the three. But in this case you're going to have to make a decision with six verdict forms. Three guilty and three you may think innocent, but they're not guilty. And I say this to illustrate a point. In your mind you may say, well, innocent, not guilty, what's the difference? What's the difference? Well, you know the defendant is presumed innocent right now, even as he's sitting right there until you go into the jury deliberation room. The presumption of innocence is there. Then you have Count 1, Count 2 and Count 3 with their elements of the crime that need in order for there to be guilt proof beyond a reasonable doubt. And each one of those elements has to be proved beyond a reasonable doubt. So when you come to the elements, for instance, in Count 3 of the intentional killing of Joe McKinney, you find yourself short of proof beyond a reasonable doubt on that element, although you may not on

the others. When it comes to Bennie Chaney, you find yourself short of the mark on that act of Morrison, being the intent to kill Bennie Chaney. And as a result, you find yourself in between guilty and innocent, which is not guilty. It's not the same, innocent and not guilty. Not guilty is not guilty. But it's also not innocent. And clearly the facts here indicate that Mr. Dukes is not innocent, but they also indicate that he's not guilty. You've got a hard job.

Now, Count 1. Count 1, both Lewis' plea and Lewis' explanation to McConnon put Derrick Dukes right into it right up to his hips. You know it. I know it. He's in deep trouble in Count 1. The gun is found in his pocket later. There's clearly some evidence that money was a problem in some sense in that his girlfriend Linda Fleischman needed to pay a bill, although he got the money from Allen Black, his mom's fiancee. But you have some troubling things in there, perhaps not as troubling as the intent to kill and the other two counts. But it really goes to the heart of the aiding and abetting.

And I can just point out some things on that, perhaps not as persuasive as I might wish. You have the opportunity of people to put a gun in Mr. Dukes' coat down at the bar because they know he's being taken out. And supposedly one or both of the aider and abettors were there. No other jackets are found in this storage room, although it's used as a cloak room by all the bouncers at the bar. You have the fact that Lewis told Tomika, Derrick didn't have anything to do with this. And you have the fact that Linda Fleischman said Derrick came home and said, "We got to go to the police." Or, "I want to go to the police." Perhaps not as persuasive, and I wouldn't want to insult your intelligence on that issue, but there should be extreme doubt in your mind regarding the intent to kill of Chaney, and the intent to kill McKinney, perhaps not so much as Count 1.

In the end, ladies and gentlemen of the jury, they say when you make a decision using proof beyond a reasonable doubt, it's supposed to be-like the most important decision in your life. They give examples. Getting married. You don't just want to marry someone you meet at the roulette table, you want to know a little bit about them. Buying a house. You have to finance it, the roof, the plumbing, the electric, the neighborhood. Maybe having an operation. Is this the kind of evidence on the issue of intent to kill that you would make a decision to have an operation? To get married? To buy a house? It's not the kind of evidence that reasonable people with common sense would apply in making a decision in one of the most important, if not the most important decision ever in Mr. Dukes' life. You do sit in judgment on Mr. Dukes. And you should have a long memory of what takes place as a result of this trial. And you may not feel good that you have to do what you have to do, but this is not a thing about feeling good, this is about doing right under the law. I'm not asking you to excuse the fact that Joe McKinney is dead. He's dead. I'm not asking for any excuse whatsoever. And I'm not asking you to say that there's no reason and there's no fault and there's no blame. Because it does lie at the feet of Kevin Lewis and his aiders and abettors. But this was a 21 year old kid, man, under the law, knocking around like a bunch of knuckleheads with his buddies, and someone got killed over it.

It was unintentional, not intentional.

You've got a hard job